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In The

Supreme Court of the United States

October Term, 1962

No. 429

JOHN J. KELLER,

Petitioner,

vs.

STATE OF WISCONSIN ex rel.
STATE BAR OF WISCONSIN,
an association,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in the above-entitled case.

DECISION AND OPINION OF THE COURTS BELOW

The decision and opinion of the Wisconsin Supreme Court herein sought to be reviewed bears its case number

193 for the August Term of 1961 and is reported in 16 Wis. 2d 377, 114 N. W. 2d 796 (1962) and is attached hereto in Appendix B.

JURISDICTION

The Wisconsin Supreme Court rendered its decision and opinion on May 1, 1962. Motion for rehearing was timely filed same being denied without opinion on June 29, 1962. This petition is filed within 90 days from said date. The jurisdiction of this court is invoked under 28 U. S. C., Section 1257(3); and under Rule 19(1) (a) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

I. Can a state, without violating Article I, Section 8, of the United States Constitution, limit or deny a federally licensed I. C. C.[1] practitioner's right to engage in federally authorized I. C. C. activities within that state solely because such practitioner is not licensed by that state to practice law therein?

II. Can a state court, without violating due process of law as guaranteed by the 14th Amendment of the U. S. Constitution, prohibit a non-lawyer from engaging in state administrative agency transportation activities solely because he does not have a state license to practice law when the state legislature has specifically authorized such activities by non-lawyers and the non-lawyer has for many

[1]Interstate Commerce Commission

years openly engaged in such authorized activities as a means of earning his livelihood?

III. Can a state, without violating due process of law as guaranteed by the 14th Amendment of the U. S. Constitution, require that those who engage in state administrative agency transportation activities must first be licensed by that state to practice law?

IV. Can a state, without violating due process and equal prtoection of the law as guaranteed by the 14th Amendment of the U. S. Constitution, prohibit an admittedly qualified person from engaging in state administrative agency transportation activities?

V. Can a state court, without violating equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution, permit one profession to practice law without a license and yet prohibit another profession from practicing law because it does not have a license?

STATEMENT OF THE CASE

Petitioner is an adult resident of Neenah, Wisconsin whose primary, usual and ordinary business is the representation of transportation clients in Interstate Commerce under license issued him by the I. C. C. Petitioner is also authorized by Wisconsin Statutes and the Wisconsin Administrative Code to represent transportation clients in and before the Wisconsin Motor Vehicle Department[1] and the Wisconsin Public Service Commission,[2] and has openly done

[1]Hereinafter abbreviated W. M. V. D.
[2]Hereinafter abbreviated W. P. S. C.

so for many years under such authority. Petitioner is not licensed by the State of Wisconsin to practice law nor does he practice law in or appear before any courts or judicial tribunals in Wisconsin or elsewhere.

Petitioner has been licensed by the I. C. C. of the United States Government to represent transportation clients before said Commission in all matters relating to interstate transportation operations, he being so licensed on October 4, 1951, and is a member in good standing of said Commission's Bar since said date. Petitioner obtained his license to practice before the I. C. C. by passing a written examination which tested his qualifications and knowledge as to (1) structure and history of the Interstate Commerce Act, as amended and related acts, (2) the Commission's Rules of Practice, (3) the general rules of evidence, (4) the leading cases involving the Commerce Clause of the United States Constitution and the Interstate Commerce Act and their significance and (5) the principal of legal ethics. Petitioner's I. C. C. license permits him to prepare applications for filing with that Commission, to appear at hearings before said Commission with the presentation of appropriate facts to support granting of such applications, and to appear and file with said Commission all appropriate bilateral contracts, lease arrangements, rate schedules, tariffs, registration of equipment and related documents all dealing with transportation matters in interstate commerce.

The W. M. V. D. and the W. P. S. C. do not issue licenses, as such, to those who practice before their agencies but do permit non-lawyers to so practice who meet their qualifications pursuant to authority given them by Wisconsin Statutes. Petitioner has, for many years, repre-

sented both interstate and intrastate transportation clients in and before these state administrative agencies with their permission. Certain of his appearances, acts and activities therein are in direct continuance or completion of services rendered for said clients in interstate commerce, to wit, obtaining of conforming authority or compliance authority from the W. P. S. C. and registration of interstate equipment and the preparation and filing of appropriate leases of interstate equipment with the W. M. V. D., and as such are a part of petitioner's usual and ordinary interstate commerce business. All other appearances, acts and activities in and before the W. P. S. C. and W. M. V. D. relate solely to intrastate transportation and consist of preparing and filing necessary documents pertaining to the leasing of intrastate equipment, filing of intrastate rate schedules and tariffs, the appearance at hearings before the W. P. S. C. with the presentation of appropriate facts to support granting of intrastate transportation applications and preparing and filing other intrastate documents as required by said Wisconsin administrative agencies.

On September 7, 1960, respondent, the Wisconsin Attorney General, on the relation of the Integrated State Bar of Wisconsin commenced a quo warranto action in the Wisconsin Circuit Court for Winnebago County alleging, in substance, that this petitioner had usurped the franchise of practicing law by representing transportation clients before state administrative agencies and the I. C. C. because he did not have a Wisconsin license to practice law, and praying that petitioner's alleged activities be enjoined. (24a-28a)

Petitioner demurred to respondent's complaint alleging, in substance, that said complaint complained of, inter alia, activities occurring outside the State of Wisconsin over which Wisconsin had no jurisdiction. (29a) Respondent promptly amended its complaint and confined its allegations to activities occurring solely within Wisconsin. (30a-35a)

Petitioner then answered respondent's amended complaint, in substance, admitting the activities complained of but denied that they constituted the illegal or unauthorized practice of law; alleged that petitioner's activities were authorized by the Wisconsin Legislature and its agencies and the United States Congress and its agency, the I. C. C., and hence were not illegal or unauthorized; that petitioner was well qualified by training, examination and experience to engage in the activities complained of against him; and that to enjoin petitioner from continuing those authorized activities would deny him due process and equal protection of the law as guaranteed by the Wisconsin and United States Constitutions. (35a-38a)

Respondent then demurred to petitioner's answer praying for judgment according to the demand of his complaint. (39a) Meanwhile, petitioner moved for summary judgment asking that respondent's complaint be dismissed on the merits. (40a-44a)

The Circuit Court heard arguments on all of the pleadings and dismissed the respondent's complaint for lack of jurisdiction over the subject matter contending that it had no jurisdiction to hear controversys involving the alleged unauthorized practice of law. (44a)

From this order of dismissal, the respondent appealed to the Wisconsin Supreme Court. (45a) Respondent argued that the circuit court had jurisdiction over the subject matter and should have decided the case on the merits, but regardless of where jurisdiction lay, now that the case was before the Supreme Court, it should decide the case on the merits. Petitioner immediately moved the Wisconsin Supreme Court to strike the appeal as to the merits because the circuit court had never rendered a decision on the merits and they were, consequently, not appealable; only a question of jurisdiction being presented for appeal by the circuit court's order under Wisconsin law. (45a) Respondent also argued, (by brief) that if the Wisconsin Supreme Court heard the merits at that time, he would be denied due process and equal protection of the laws under the Wisconsin and United States Constitutions because it would be contrary to Wisconsin's procedural law. Petitioner further moved that the respondent's appeal as to the jurisdictional question be dismissed and that the case be remanded to the circuit court because petitioner agreed with respondent's contention that the circuit court did have jurisdiction to hear alleged unauthorized practice of law cases and, hence, there was no dispute between petitioner and respondent on that issue. (45a) The Wisconsin Supreme Court, after argument, denied both of petitioner's motions for dismissal and thereafter heard respondent's appeal. (45a)

The Wisconsin Supreme Court handed down its decision on appeal and reversed the Circuit Court, holding that the circuit court did have jurisdiction to hear alleged unauthorized practice of law cases and further, directed the

circuit court to enter an injunction against petitioner restraining him:

> "(a) From the giving of legal advice and instruction to clients to inform them of their rights and obligations;
>
> "(b) From the preparation for clients of documents requiring knowledge of legal principals not possessed by ordinary laymen; and,
>
> "(c) From appearing as an advocate asserting legal rights for a client before public tribunals which possess power and authority to determine the rights of such clients according to law."

The Wisconsin Supreme Court's opinion acknowledged that petitioner's activities had been authorized and that he was admittedly qualified to engage in these activities. Nevertheless, the court was of the opinion that these activities constituted the practice of law for which petitioner did not have a license, and hence, must be enjoined. The court justified its holding by reversing prior Wisconsin law and declaring that the Wisconsin judiciary has the sole and exclusive right to determine what constitutes the practice of law and who may engage in same. (3a-16a)

Petitioner made timely motion for rehearing (46a) again contending, (by brief) in substance, that petitioner's activities had been authorized and, consequently, could not constitute the unauthorized or illegal practice of law; that the court's decision deprived petitioner of his constitutional rights to due process and equal protection of the law as guaranteed by the United States Constitution and further violated Article I, Section 8 of the United States Constitution; and that the courts claim to exclusive and sole juris-

diction over the practice of the law usurped a legislative function and was in violation of the Separation of Powers Doctrine of the Wisconsin Constitution. Petitioner's motion for rehearing was denied with opinion. (46a)

ARGUMENT

I.

Article I, Section 8 of the United States Constitution gives the Congress of the United States the exclusive power "to regulate commerce—among the several states—" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof."

Pursuant thereto, Congress created the I. C. C. and established rules governing transportation in interstate commerce. Specifically, Congress enacted 49 U. S. C. Section 17 (12) relating to practice and appearances before the I. C. C. as follows:

> "ADMISSION TO PRACTICE—the Commission is authorized to promulgate reasonable rules and regulations relating to admission to practice before it . . ."

Pursuant to this congressional authority, the I. C. C. enacted Rule 8 of its rules of practice which are contained in the Appendix to F. C. A. 49. Rule 8 declares:

> "The following classes of persons whom the commission finds, upon consideration of their application, to be of good moral character and possess the requisite

qualifications to represent others may be admitted to practice before the Commission: (a) Attorneys-at-Law —(b) PERSONS NOT ATTORNEYS—any person not an attorney-at-law who is a citizen or resident of the United States and who shall satisfy the Commission that he is possessed of the necessary legal and technical quailfications to enable him to render valuable services before the Commission and that he is otherwise competent to advise and assist in the presentation of matters before the Commission."

All non-attorney applicants are given a written examination by the I. C. C. testing their qualifications and upon successful completition of said examination, the I. C. C. issues the applicant a license to practice before it regarding all interstate transportation matters. Petitioner, as a non-lawyer, has been so licensed by the I. C. C.

However, the State of Wisconsin now seeks, under its police power, to limit this federally granted privilege by enjoining him from giving any legal advice, preparing any legal documents and acting as an advocate before any public tribunals in the State of Wisconsin and attempts to now require petitioner to obtain a Wisconsin license to practice law before he can continue his federally authorized I. C. C. activities in Wisconsin.

It is elementary that no state can limit, abridge or burden in any way a federally granted right which is within Congress' Constitutional power and authority to grant and any state law in conflict with federal law must yield. This principal was early established by *McCulloch vs. Maryland* (1819) 4 Wheaton 316, and *Gibbons vs. Ogden* (1824) 9 Wheaton 1. In *McCulloch, supra*, this court said:

"The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared. . . . The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution form the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding."

In *Gibbons, supra,* this court said:

"Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance to the Constitution, the court will enter upon the inquiry, whether the laws of (any state), as expounded by the highest tribunal in that state, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power to regulate commerce with foreign nations and among the several states, or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of (the state) must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the union, must be erroneous." (Portion in parenthesis added for explanation.)

Likewise, in *Johnson vs. Maryland* (1920) 254 U. S. 51 this court held that no state could impose state licensing requirements on authorized agents of the United States Government. Petitioner, as a licensed I. C. C. practitioner, is an authorized agent of the United States Government and Wisconsin cannot require him to have a state license to do what the federal government has already authorized him to do.

It is respectfully submitted that the Wisconsin Supreme Court's injunctional order, insofar as it applies to petitioner's federally authorized I. C. C. activities, violates Article I, Section 8 of the United States Constitution.

It should be noted here that Wisconsin requires certain interstate transportation traffic moving through Wisconsin to obtain conforming authority from the W. P. S. C.[1] and to register interstate equipment and file appropriate leases of interstate equipment with the W. M. V. D.[2] These activities are a direct continuance or completion of services rendered for clients in interstate commerce and are a part of petitioner's usual and ordinary interstate commerce business. As such, Wisconsin should be without power to deny or limit petitioner's right to engage in these state activities which are a completion of services rendered for clients in interstate commerce. This conclusion seems apparent when the affect of state control is considered on petitioner's federal right to engage in interstate commerce practice. In the representation of an interstate client, it is petitioner's duty to appraise his client of applicable Wisconsin law which will apply to the client's interstate move-

[1]Wis. Stats. 194.20
[2]Wis. Stats. 194.03 (4)

ment through Wisconsin; to wit, load limits, highway restructions, safety requirements of vehicles, etc. Said interstate client must also be advised that Wisconsin will require all interstate equipment moving through Wisconsin, and leases of same, to be registered with the W. M. V. D. and that compliance or conforming authority must be obtained from the W. P. S. C. Petitioner would be derilect in his duty to his interstate client if he did not or could not do so. Likewise, said interstate client has a right to expect that petitioner will do all things necessary to insure client's lawful movement through Wisconsin such as the filing of appropriate state documents with the proper state officials. These mandatory related state activities are an actual part of interstate commerce and petitioner's duty, under his I. C. C. license to both his client and the Commission, seems to require that his right to engage in same be free of duplicitous state control. Looking at the problem in another perspective, should an interstate trucker moving from New York to California be required to obtain authorized state representation from each of the states lying between those two points? Surely, this would be an unnecessary incumberance on interstate commerce and especially on the interstate carrier. The I. C. C. practitioner was intended to relieve this burden on interstate traffic and to facilitate interstate movement anywhere throughout the nation.

It is respectfully submitted that those state activities which are a direct continuance or completion of interstate commerce must be free of duplicitous state control, at least free of state discrimination and arbitrary supervision, where the federal government has authorized certain quali-

fied agents to insure the free and unburdened movement of interstate commerce throughout the states.

II.

Petitioner has been authorized by Wisconsin Statutes[1] and the Wisconsin Administrative Code,[2] as a non-lawyer, to engage in administrative agency activities and has done so openly for many years with regard to transportation matters. The Wisconsin Supreme Court even recognized this authorization on page 386 of its opinion where the court said:

> "For present purposes, at least, accepting respondent's (petitioner's) interpretation of the scope of P. S. C. Rule 2.32, the Commission can listen to or be advised by anyone it likes on any matter properly coming before that body. . . . In like manner the Public Service Commission may countenance appearances before it by laymen. . . ." (Portion in parenthesis added for explanation.)

Nevertheless, the Wisconsin Supreme Court, in the face of this authorization, enjoined petitioner from giving any legal advice, preparing any legal documents and appearing as an advocate before any public tribunals; an injunction which quite clearly emasculates the authorization petitioner previously had.

It is respectfully submitted that petitioner's authorization to engage in administrative agency activities under legislative and administrative authority, and his reliance

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[1] Wis. Stats. 227.08, 195.03 (1)
[2] W. A. C. P.S.C. 2.32 (1)

thereon in establishing a lawful business, is a property right, vested in legal effect, which he cannot be deprived of without just and reasonable cause under due process of law.

If petitioner were not qualified, the Wisconsin Supreme Court's order would probably be just and reasonable. However, there is no question but that petitioner is well qualified to engage in administrative agency activities. His qualifications are admitted in the record by affidavit in support of summary judgment which respondent did not controvert and, consequently, under Wisconsin law constitutes uncontroverted evidence of petitioner's qualifications. Moreover, respondent conceded petitioner's qualifications on oral argument to the Wisconsin Supreme Court and the Wisconsin Supreme Court's opinion acknowledges petitioner's qualifications at page 387 where the court said:

> "Respondent (petitioner) contends that by his study and experience he has become as well or better qualified than many licensed lawyers in the particular limited field in which he holds himself out to serve his clients, and his activities in that area should not be restrained. *These practical qualifications in the instant case may be admitted without affecting the result.*" (Emphasis added.) (Portion in parenthesis added for explanation.)

How, then, can the Wisconsin Supreme Court deprive petitioner of his right, under legislative authorization, to engage in administrative agency activities? Petitioner believes that the principal of *Dobbins vs. Los Angeles* (1904) 195 U. S. 223 is controlling. There the City of Los Angeles adopted an ordinance in September fixing limits within

which gas works could be constructed. Thereafter a permit was granted to petitioner for erection of a gas works plant. In November, another city ordinance was passed amending the September ordinance. The November ordinance excluded the territory which petitioner had purchased in reliance upon the September ordinance and on which petitioner's gas works were already in the course of erection pursuant to his permit. There had been no change in the neighborhood or conditions. This court held that petitioner's permit and purchase of the land with erection of the plant already started, constituted a vested property right and that the second ordinance, which now excluded this land, was a deprivation of petitioner's property without due process since the exclusion was seemingly unnecessary and without just cause.

Just as the permit, purchase of land and erection of a building thereon pursuant to said permit was a vested property right in *Dobbins, supra*, so is petitioner's legislative authorization to engage in administrative agency activities and his reliance thereon in establishing a lawful business, a vested property right in this case. Since petitioner is admittedly qualified to engage in administrative agency activities, the Wisconsin Supreme Court's order enjoining these activities is unnecessary and unreasonable.

Petitioner, respectfully submits that his legislative authorization to engage in administrative agency activities, and his reliance thereon in establishing a lawful business, is a vested property right which the Wisconsin Supreme Court has deprived him of without just or reasonable cause violating petitioner's right to due process of law.

III.

Petitioner's administrative agency activities do not constitute the practice of law. Administrative agencies do not possess any judicial powers or perform any judicial functions.* They are fact finders only. Even our Wisconsin Supreme Court recognizes that administrative agency activities have very little, if anything, to do with the practice of law when it said in *Graywell Drilling Co. vs. State Board of Health* (1952) 263 Wis. 417 at page 419:

> "Not only pleadings, but all proceedings before administrative bodies are generally simple and informal. The function of administrative agencies and courts are so different that the rules governing judicial proceedings are not ordinarily applicable to administrative agencies, unless made so by statute. It is not the province of courts to prescribe rules of procedure for administrative bodies, as that function belongs to the legislature. The legislature may prescribe rules for pleadings and procedure before such bodies, or it may authorize the administrative board or agency to prescribe its own rules."

If administrative agency practice is truly the practice of law, then the examiners and commissioners who preside over these hearings should be required to be attorneys also. However, they are not so required and many are not attorneys. It seems unreasonable to require an attorney to stand in judgment before his non-attorney peer. To prove the utter ridiculousness of this matter, the court prohibits petitioner from practicing before administrative agencies, because he is not an attorney, but the governor through po-

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*Clintonville Transfer Line v. P. S. C. (1945) 248 Wis. 59
Dairy Employees v. Wis. E. R. Board (1952) 262 Wis. 280

litical appointment could appoint him as a commissioner to preside over the attorneys! It surely requires the stretch of our imagination to classify administrative agency activities as the practice of law.

Petitioner acknowledges that the state can require certain qualifications of persons who engage in administrative agency activities just as it can for all professions which affect the public welfare. However, any standard selected must not be unreasonable, arbitrary, discriminatory or capricious and must have a reasonable relationship to the interests sought to be protected. *Nebbia vs. New York* (1933) U. S. 502. Assuming for the moment that administrative agency activities can be classified as the practice of law, it is submitted that requiring a law license to engage in administrative agency activities is still un-reasonable and arbitrary and in violation of due process of law. The medical profession is composed of physicians, surgeons, chiropractors, chiropodists, optometrists, opthomologists, nurses, physical therapists, medical technicians, osteopaths and a host of other types of practitioners. They all technically practice the art of healing, but to vastly different degrees, and the state legislature has wisely recognized that the same qualifications are not necessary for one who practices chiropracty as for one who practices surgery. To require an osteopath to be an M. D. would be clearly unreasonable. Such was the case in *People vs. Schaeffer* (1923) 310 Ill. 574, 142 N. E. 248. There the State of Illinois required, by statute, that anyone practicing medicine must be a graduate of an accredited four year medical school. The statute further defined the practice of osteopathy as the "practice of medicine." The Illinois Supreme

Court held that this statute was unreasonable and discriminated against osteopaths because in requiring them to be graduates of medical schools, it required that they study therapeutics which were not a part of osteopathic healing. The Illinois Supreme Court further noted that medical doctors were not required to study osteopathy and yet under the statute could practice osteopathy. Consequently, the Illinois Supreme Court held that the Statute violated the 14th Amendment of the United States Constitution.

Likewise, requiring petitioner to be a licensed attorney before he can engage in administrative agency activities is unreasonable and arbitrary. Petitioner's activities do not in any sense require him to know anything about wills, probating estates, divorces, negligence, torts, trusts, criminal law or any of the other subjects which are taught in law schools or in which lawyers engage. In fact, most lawyers graduate from our law schools without having any concept of the motor carrier industry or operation of administrative agencies. Administrative law and procedure is not even a mandatory course in most law school curriculums and where it is offered, it is taught only from a constitutional standpoint. Therefore, while it may be reasonable to say that all attorneys are presumably qualified to practice before administrative agencies (a dubious premise at best), it is quite unreasonable to say that all non-attorneys are presumably not qualified.

In *Schware vs. Board of Bar Examiners*, (1956) 353 U. S. 232, this court said at pages 238 and 239:

> "A state cannot exclude a person from the practice of law *or from any other occupation* in a manner or for reasons that controvene the due process or equal pro-

> tection clause of the XIV Amendment. (Citations). A court can require high standards of qualification such as good moral character, or proficiency in its law, before it admits an applicant to the bar, but any qualifications must have a rational connection with the appilcant's fitness or capacity to practice law. (Citations). . . . Even applying permissible standards, officers of a state cannot exclude an applicant where there is no basis for their finding that he fails to meet the standards or when their action is invideously discriminatory. (Citations)." (Emphasis added.)

The Wisconsin Legislature created these administrative agencies, authorized non-attorneys to engage in these activities, authorized non-attorneys to sit as examiners and commissioners in these administrative agencies and prescribed rules for them. As legislative creations, administrative agencies are fact finders only, possessing neither legislative nor judicial powers. The hearings are informal and all documents are standardized. Furthermore, petitioner has been recognized by all concerned as well qualified to engage in these administrative agency activities. Petitioner respectfully submits that the Wisconsin Supreme Court's order negating this clear legislative expression and requiring that only attorneys can engage in these activities is arbitrary, unreasonable and discriminatory and bears no reasonable relationship whatsoever to the interests sought to be protected and, consequently, denies petitioner due process of law.

IV.

We respectfully submit that the Wisconsin Supreme Court's order, insofar as it applies to petitioner's state administrative agency activities, denies petitioner the equal protection of the law. It is a matter of fact and record that petitioner is well qualified to engage in administrative agency activities. In *Schware, supra,* this court said that a state cannot deny a person the right to follow his calling if he meets the qualifications prescribed for that vocation. Now if petitioner had the opportunity to take a test (which he does not) inquiring into his qualifications to engage in administrative agency activities and if he passed the test, the state could not deny him the right to continue those activities. In our case, petitioner's qualifications are admitted in fact and in the record (just as much as if he had passed a test) and to deny him the right to continue these activities denies him equal protection of the law. Equal protection of the law requires that all persons in like circumstances be treated equally—that the law apply equally to all persons in like circumstances. *Maxwell vs. Bugkee* (1919) 250 U. S. 525. If attorneys are presumably qualified, and petitioner is admittedly qualified to engage in administrative agency activities, then petitioner is being denied the equal protection of the law by the Wisconsin Supreme Court's order refusing to permit him to continue these activities.

V.

The Wisconsin Supreme Court has attempted to justify its action by declaring that petitioner's activities con-

stitute the practice of law and then claiming it has sole and exclusive jurisdiction to regulate and define the practice of law and to determine who may engage in same. Assuming (but not conceding) that the Wisconsin Court's premise is correct, it is respectfully submitted that the Wisconsin Supreme Court has exercised its powers in an arbitrary and discriminatory manner, thereby depriving petitioner of the equal protection of the law.

In *State ex rel. Reynolds vs. Dinger* (1961) 14 Wis. 2d 193, the Wisconsin court was confronted with the question of whether execution of real estate forms by non-lawyer brokers constituted the practice of law and, if so, whether such practice of law was permissible by non-lawyers. The Wisconsin Supreme Court concluded in that case that the execution of real estate forms by non-lawyer brokers did constitute the practice of law but, nevertheless, permitted non-lawyer brokers to do so. Thus, the Wisconsin Supreme Court allowed some 12,000 real estate brokers and salesmen to practice law without a license but now denies petitioner the right to do so, (assuming practitioner is practicing law like the court insists). Now either no one can practice law without a law license or else everyone can. To permit non-lawyer brokers to do so and not other non-lawyer professionals is completely arbitrary and discriminatory and is in violation of the equal protection clause of the United States Constitution.

It is respectfully submitted that the Wisconsin Supreme Court's order forbidding petitioner to practice law because he does not have a law license, while allowing some 12,000 Wisconsin realtors to do so without a law license, denies petitioner the equal protection of the laws. No matter how

we view this case, petitioner has been denied equal protection of the laws.

VI.

We sincerely and respectfully submit that this case shocks our conscience and transcends all notions of fair play and decency. The Wisconsin Integrated Bar and its parent, the Wisconsin Supreme Court, have joined forces through the State Attorney General's office and have created a "closed shop" for lawyers. Their purpose is apparent; to fence out, under the guise of protecting the public, all possible competing elements of society and thereby securing an economic monopoly for lawyers. We are told this action is necessary for the public's protection but what could be farther from the truth when petitioner is admittedly qualified and more so than most attorneys in his field. While we regard this motivation as appalling, we think its consequences are intolerable. This unbridled power leaves petitioner, and all other non-lawyers professionals, completely at its mercy. The legal profession, acting through the integrated bar and the judiciary, sits as prosecution, judge and jury. As interested parties, petitioner can not even have his case heard by an impartial body and has two strikes against him before he starts. Even the protection once afforded by the Wisconsin Constitution and the Wisconsin Legislature has now been conveniently vitiated by the Wisconsin Court and it has made new law to conform to its own pleasure and convenience.

For example, the Wisconsin Supreme Court now claims that the power to regulate the practice of law is exclusively

judicial and derived from Article VII Section 2 of the Wisconsin Constitution which reads:

> "The judicial power of this state, 'as to matters of law and equity,' shall be vested in the Supreme Court, Circuit courts, courts of probate and in the justices of the peace."

Since petitioner was authorized by the Wisconsin Legislature to engage in administrative agency activities, it was necessary for the court to emasculate this source of authority and claim it as its own. However, we do not find any language in Article VII, Section 2 which says that the regulation of the practice of law is a judicial power, let alone exclusive. Nor can we find that Article VII, Section 2 was ever intended to mean this. In fact, all of the evidence is to the contrary. The legislative and judicial history of Wisconsin clearly negates this contention. In *In Re Cannon* (1932) 206 Wis. 374 and *Vernon County Bar Association vs. McKibbin* (1913) 153 Wis. 350, the Wisconsin Supreme Court specifically recognized that the State Legislature has a constitutional power to regulate the practice of law. Even in *State ex rel. Reynolds vs. Dinger* (1961) 14 Wis. 2d 193, the Wisconisn Supreme Court recognized that while the court has an inherent power to regulate the practice of law, the state legislature likewise has a constitutional power to regulate same and the court will only invalidate such legislation when and if the public interest is being threatened. The Wisconsin Supreme Court's attempt to now deprive the Wisconsin Legislature of its constitutional right to regulate the practice of law is a bold trespass on the Wisconsin Separation of Powers Doctrine.

The Wisconsin Constitution itself further refutes the Wisconsin Court's contention that the power to regulate the practice of law is exclusively a judicial function. Article XIV Section 13 of the Wisconsin Constitution reads:

> "Such parts of the common law as are now in force in the Territory of Wisconsin, not inconsistent with this Constitution shall be and continue part of the law of this state until altered or suspended by the legislature."

In Rules of Court Case 204 Wis. 501 (1931), the Wisconsin Supreme Court said at page 505:

> "The question as to what powers are essentially judicial and what legislative is to be resolved by ascertaining the definition and scope of such powers at the time the Constitution was adopted. What constitutes judicial power within the meaning of the Constitution is to be determined in the light of the common law and the history of our institutions as they existed anterior to and at the time of the adoption of the Constitution."

The Wisconsin Courts have never at any time had control of persons not admitted to their bars or over matters which did not pertain to the administration of justice in their courts. In England, the practice of law was, at the time of the adoption of the Wisconsin Constitution, and still is divided in two categories; Barristers and Solicitors. Only barristers could practice in the courts whereas solicitors could not. Solicitors practiced law exclusively outside of the court room. It is interesting to note that the regulation of solicitors and their activities are still exclusively controlled by England's Parliment whereas the regulation of barristers and their activities are exclusively controlled

by the English courts and the Inns of the Courts. We submit that the framers of our Wisconsin Constitution never intended the judiciary to have exclusive control over the practice of law and to this we can add that they intended any changes to be made by the legislature and not the courts. In fact, we seriously doubt whether the Wisconsin judiciary even has exclusive control over the practice of law in the courts under our Wisconsin Constitution. Article VII, Section 20 of the Wisconsin Constitution reads:

> "Any suitor in any court of this state, shall have the right to prosecute or to defend his suit either in his own proper person, or by an attorney or agent of his choice."

This language of our Wisconsin Constitution says that any suitor in court may be represented by either an attorney or agent. The words "attorney" and "agent" were not synonomous in Webster's Dictionary in 1850, and under familiar rules of construction, effect must be given to both words. This makes us wonder whether the Wisconsin court can constitutionally keep a layman out of court if he is qualified. To say an attorney is presumably qualified is one thing—but to say a layman is presumably not qualified is quite another matter!

We respectfully submit that neither the Wisconsin Constitution, the legislative history or past judicial decisions of Wisconsin give the Wisconsin judiciary any exclusive power to regulate the practice of law. On the contrary, the constitutional power to regulate the practice of law in Wisconsin has always rested primarily with the legislature and at best, the Wisconsin courts have only a constitutionally inherent power to regulate the practice of law

for the protection of the public and to insure the proper administration of justice in the courts but only in the courts. We respectfully submit that while we must abide the Wisconsin Court's present declaration of Wisconsin law, it is nevertheless an arbitrary and discriminatory exercise of the court's judicial powers for the purpose of discriminating against non-lawyer professionals.

Another example of the invideous handling of petitioner's case occurred when the Wisconsin Supreme Court denied petitioner his constitutional right to be heard by the Wisconsin Circuit Court. It will be recalled that the Wisconsin Circuit Court dismissed respondent's complaint for lack of subject matter jurisdiction. It was from this order of dismissal for lack of jurisdiction that respondent appealed to the Wisconsin Supreme Court. Under Wisconsin law, the only question properly before the Supreme Court was whether the Circuit Court did or did not have subject matter jurisdiction. At that point, there had been no decision on the merits and the merits of the lawsuit were not properly before the Wisconsin Supreme Court under its appeal jurisdiction.* Nevertheless, the Wisconsin Supreme Court, solely on its own initiative, rendered a decision on the merits over petitioner's strenuous constitutional objections. Again, the motivation of the Wisconsin Supreme Court is apparent; it did not want to risk having petitioner prevail in the trial court on a trial of the merits therein under existing law.

We respectfully submit that petitioner has not been afforded the opportunity to have his case heard by an im-

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*Hicken v. Alden (1870) 26 Wis. 40
Puncheon v. Hill (1875) 38 Wis. 156

partial tribunal or in a fair manner. Since the Wisconsin Supreme Court is the final state arbiter, there is no place for petitioner to turn but to this court. The over-zealous ambitions of the Integrated Bar, through judicial sanction, have left petitioner and other non-lawyer professionals completely at its mercy.

CONCLUSION

The questions raised are substantial.

The Wisconsin Supreme Court's order infringing on petitioner's I. C. C. rights violates the commerce clause of the United States Constitution. If Wisconsin is allowed to do this, the other states will follow and the I. C. C. practitioner will be non-existant. The State of Wisconsin must not be allowed to usurp federal powers!

Petitioner has been denied due process and equal protection of the laws under the United States Constitution. What good are constitutional rights if they are not enforced and protected?

Since the Wisconsin Supreme Court and the Wisconsin Integrated Bar are actually one and the same, and inescapably interested parties, petitioner has had no opportunity for a fair and impartial hearing by an independent tribunal. Especially is this true where the Wisconsin court has created new state law to suit its own pleasure and convenience. The United States Supreme Court is the only tribunal where petitioner can get a fair and impartial hearing.

With the advent of integrated bars throughout the states and their insatiable desire to promote the interests of the legal profession, these questions take on added significance and will have national affect.

The United States Supreme Court has not directly passed upon the questions here presented and the decision of the Wisconsin Supreme Court appears to be in conflict with what authority is available.

For the foregoing reasons, it is respectfully requested that the Supreme Court of the United States grant certiorari in this case.

Respectfully submitted,

JAMES E. QUACKENBUSH

AND

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Attorneys for Petitioner

APPENDIX A

Applicable Provisions of United States Constitution

ARTICLE I

Section 8. The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

AMENDMENT ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

Applicable United States Code Provisions

49 U. S. C., Section 17 (12) The Commission is authorized to promulgate reasonable rules and regulations relating to admission to practice before it, and is authorized to impose a reasonable fee for such admission, and such

fee shall be covered into the treasury of the United States as miscellaneous receipts.

Applicable Interstate Commerce Commission Rule

(Appendix F. C. A. 49, Rules of Interstate Commerce Commission)

The following classes of persons whom the commission finds, upon consideration of their application, to be of good moral character and possess the requisite qualifications to represent others may be admitted to practice before the commission; (a) Attorneys at Law . . . (b) PERSONS NOT ATTORNEYS . . . any person not an attorney at law who shall satisfy the commission that he is possessed of the necessary legal and technical qualifications to enable him to render valuable services before the commission and that he is otherwise competent to advise and assist in the presentation of matters before the commission.

APPENDIX B

16 Wis. 2d 377

OPINION OF THE
SUPREME COURT OF WISCONSIN
MAY 1, 1962

Rehearing denied June 29, 1962

STATE OF WISCONSIN, ex rel.,
STATE BAR OF WISCONSIN,

Appellant,

vs.

JOHN J. KELLER,

Respondent.

August Term, 1961—No. 193

APPEAL from an order of the circuit court for Winnebago County: HELMUTH F. ARPS, Circuit Judge. *Reversed with directions for judgment.*

The appellant attorney general, acting on relation of the State Bar of Wisconsin, an association, began a *quo warranto* action against respondent in circuit court for Winnebago County, alleging that respondent, a layman, had usurped and was continuing to usurp the franchise of practicing law. Respondent answered on the merits and appellant demurred to the answer. Respondent then moved for summary judgment dismissing the complaint. By an order

dated September 19, 1961, the circuit court dismissed this action upon the ground that such court has no jurisdiction over the subject matter.

The appellant submits that the circuit court had jurisdiction over the subject matter and should have tried the case on the merits, but regardless of where jurisdiction lies, the supreme court should now decide the case on the merits.

Further facts are stated in the opinion.

BROWN, J. Relator's complaint alleges that John J. Keller, respondent herein, a person not licensed to practice law in Wisconsin, performs numerous described services for others which constitute the practice of law. The complaint demands judgment adjudging that Keller has unlawfully usurped the privilege of practicing law and requiring him to cease and desist from such illegal practices. Keller answered to the merits. Neither party questioned the jurisdiction of the circuit court and each party submits that that court erred in deciding it was without jurisdiction.

It was the trial judge himself who questioned his court's jurisdiction over the subject matter. He based his determination on the decisions of *Lathrop v. Donohue* (1960), 10 Wis. (2d) 230, 102 N. W. (2d) 404, and *State ex rel. Attorney General v. Dinger* (1961), 14 Wis. (2d) 193, 109 N. W. (2d) 685, and language appearing in the opinions in those cases.

The circuit court's *quo warranto* jurisdiction is derived from sec. 8, art. VII, of the Wisconsin constitution:

"*Circuit court, jurisdiction.* Section 8. The circuit courts shall have original jurisdiction in all matters

civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law; and appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. They shall also have the power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions."

It is evident that we misled the learned trial court, particularly by the statement in the opinion in *Dinger, supra,* at page 206, wherein we said that the regulation of the practice of law is a judicial power vested "exclusively" in the supreme court. At the moment we were contrasting conflicting claims of power by the legislative and judicial branches of the state government to regulate the practice of law. Holding, as we did, that the regulation of the practice of the law is a judicial power vested in the courts by the state constitution, the exercise of the power must *ultimately* lie in the supreme court. When the point of ultimate decision is reached the supreme court's power is and must be exclusive. Meanwhile, pending the supreme court's exercise of the power of regulation applicable to the facts of a given case, the power exists as a general judicial power to be shared by the courts subordinate to the supreme court. In the *Lathrop Case, supra,* the supreme court had made a regulatory order applicable to all members of the Wisconsin bar. The trial court there correctly held that it had no jurisdiction enabling it to pass upon the validity of the supreme court's order. Neither *Lathrop* nor *Dinger, supra,* deprives circuit courts of jurisdiction over attempts

of individuals to practice law who have not been admitted to such practice under the rules of the supreme court.

We regret that unintentionally we caused the learned trial court to conclude that the circuit courts lacked jurisdiction in such matters as are presently in question. Our language, particularly in the *Dinger* opinion, induced his error but as error we must reverse his order dismissing the complaint.

What ought to be done now is the next question. In his written decision the trial court stated that "There are no controverted issues of fact. A determination of the issues . . . involves purely a determination of issues of law." Respondent insists that the supreme court remand the cause for trial and decision by the circuit court, otherwise respondent is denied due process. However, respondent moved for summary judgment in circuit court. (Sec. 270.635, Stats.) The motion and respondent counsel's supporting affidavit alleges that counsel believes appellant's action has no merit. Counsel, being the able and learned lawyer which we know him to be, of course recognizes that summary judgment is granted only when there are no substantial issues of fact to be tried. *Prime Mfg. Co. v. A. F. Gallun & Sons Corp.* (1938), 229 Wis. 348, 281 N. W. 697; *Batson v. Nichols* (1951), 258 Wis. 356, 46 N. W. (2d) 192. Entry of summary judgment is proper where issues are legal rather than factual. *Phillips Petroleum Co. v. Taggart* (1955), 271 Wis. 261, 73 N. W. (2d) 482.

We have studied the pleadings and affidavits and reach the same conclusion that impelled respondent's counsel to conclude that the case is one proper and suitable for summary judgment, i.e., that the only issues here are legal.

Providing for summary judgments, sec. 270.635 (3), Stats., states:

> "Upon motion by a defendant, [for a summary judgment] if it shall appear to the court that the plaintiff is entitled to a summary judgment, it may be awarded to him even though he has not moved therefor."

Respondent, the defendant, previously moved in this court that the appeal be dismissed because the parties agreed that the circuit court had jurisdiction and the cause should be remanded for trial. We denied the motion saying:

> "The motion to dismiss appeal is denied and the motion to strike a portion of the plaintiff's brief is denied, it appearing that upon plaintiff's appeal this court has jurisdiction to review the refusal of the Circuit Court to sustain plaintiff's demurrer to the answer and would, under Section 274.12 (2) Stats., have jurisdiction to review the failure of the Circuit Court to grant defendant's motion for summary judgment."

We remain of the same mind. The trial court and both parties assure us that there are no substantial issues of fact to be resolved by trial. The appeal has brought up the whole record. Only issues of law are presented. We consider that we may properly examine and determine the legal issues and to render such judgment as may be consistent with the determination.

> "While as a general rule this court may and does refuse to consider and dispose of questions not properly or timely presented for consideration of the trial court, as has been stated in a number of cases, among others [cases cited], yet as stated in *Dupont v. Jonet*, 165 Wis. 554, 558, 162 N. W. 664, and in *Cappon v. O'Day*, 165 Wis. 486, 162 N. W. 655, it unquestionably

has the power to and may consider the entire record and dispose of questions of law clearly presented on the record, . . ." *Braasch v. Bonde* (1926), 191 Wis. 414, 418, 211 N. W. 281.

". . . The general rule is that this court will not consider an assignment of error which is presented in this court for the first time but the court has the unquestioned power to consider the entire record and to dispose of questions of law clearly presented therein. *Braasch v. Bonde* (1926), 191 Wis. 414, 211 N. W. 281. Whether or not it will do so depends upon the circumstances of the case. . . ." *Estate of Zeimet* (1951), 259 Wis. 619, 622-623, 49 N. W. (2d) 924.

". . . Whether this court should review a question raised herefor the first time depends upon the facts and circumstances disclosed by the particular record. It undoubtedly has the power, but ordinarily will not exercise it. The question is one of administration, not of power. . . ." *Cappon v. O'Day* (1917), 165 Wis. 486, 491, 162 N. W. 655.

This statement in *Cappon* by Mr. Justice Rosenberry, speaking for the court, applies equally well to the present situation where the questions were raised by the pleadings but where the trial judge had refrained from passing upon them. We consider that we may determine the case on the merits and our doing so does not infringe respondent's right to due process of law.

Thus we address ourselves to the merits as a question of law raised by undisputed facts. The issue is whether the admitted activities of respondent, as listed in the complaint, constitute the practice of law. Summarized, these activities, which respondent proposes to continue, are: Re-

spondent, admittedly not a member of the Wisconsin bar, has engaged in considerable activity before the Wisconsin Public Service Commission for the past seven years. He has made applications to the P. S. C. in behalf of his clients for authority to conduct trucking operations, handled proceedings on behalf of truckers with respect to such applications, appeared before the P. S. C. on behalf of various truckers and in opposition to the granting of permits to other truckers. In the course of these proceedings respondent has examined witnesses and taken such steps as necessary to make a record upon which formal action may be taken by the commission adjudicating the rights of the aprties.

Respondent's answer pleads further facts: he is a licensed practitioner before the Interstate Commerce Commission, is also licensed by the Public Service Commission of Indiana, and he is familiar with the general rules of evidence, the leading cases involving the commerce clause of the constitution and the Interstate Commerce Act, and the principles of legal ethics. While admitting the practices of which he is accused, respondent's answer alleges:

> "(3) . . . that all activities which the plaintiff complains of against him were performed as a qualified layman and not an odinary layman, and do not constitute the practice of law as defined and prohibited by Wisconsin Statutes Section 256.30.
>
> "(4) That the representation of clients in matters involving trucking in interstate commerce is the primary business of the defendant; that a considerable portion of the activities of the defendant in appearing before the Public Service Commission of Wisconsin and other administrative agencies of the State of Wis-

consin, all as alleged in the plaintiff's complaint, involve the rendering of professional advice and service incidental to said defendant's lawful interstate business.

"(5) The defendant alleges that all activities complained of in this complaint pertain to appearances before, or services in connection with, various administrative bodies of the State of Wisconsin; that the defendant has not and does not at any time whatsoever appear before any judicial tribunal or court of the State of Wisconsin, or any other state; that Chapter 195 Wisconsin Statutes and the Wisconsin Administrative Code specifically permits representation of people by agents other than attorneys before administrative agencies and that such representation does not constitute the practice of law as prohibited by Wisconsin Statutes Section 256.30."

Accordingly, he submits that what he has been doing does not constitute the practice of law as defined and prohibited by sec. 256.30 (2), Stats. Such section reads:

"Every person who shall appear as agent, representative or attorney, for or on behalf of an other person, or an firm, copartnership, association or corporation in any action or proceeding in or before any court of record, court commissioner, or judicial tribunal of the United States, or of any state, or who shall otherwise, in or out of court for compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section."

Sec. 195.03 (1), Stats. 1959, which respondent cites, gives the P. S. C. power "to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings." Among these rules is Wis. Adm. Code—PSC 2.32, which provides:

> "Appearances. (1) A person desiring to participate in a proceeding, whether on his own behalf or as an authorized agent or attorney, shall enter his appearance by giving his name and address and the name of any party he represents and in what capacity he is employed by such party."

Respondent contends that this authorizes him to pursue the practices before the commission to which appellant objects as being the illegal practice of law.

The legislature's creation of the Public Service Commission with its rule-making powers does not in any way supersede the exclusive power of the judiciary, ultimately residing in the supreme court, to determine what is or is not the practice of law and to restrict such practice to persons licensed by the court to engage in it. For present purposes, at least, accepting respondent's interpretation of the scope of the P. S. C. Rule 2.32, the Commission can listen to or be advised by anyone it likes on any matters properly coming before that body. But its tolerance does not avert the consequences to an individual who is guilty of practicing law without a license. The admission of a person to practice law is constitutionally an exclusive power of the court and the attempt to exercise it by the legislature itself (or its agency) is unconstitutional and void. *In re Cannon* (1932), 206 Wis. 374, 240 N. W. 441; *State ex rel.*

Attorney General v. Dinger (1961), 14 Wis. (2d) 193, 109 N. W. (2d) 685.

In the latter case we noted that real estate brokers had been filling out certain standard forms, a practice well known to the court for some one hundred years. The board recognized that practice and by rule somewhat circumscribed it, as a matter of regulating the brokers over which the board had jurisdiction. In so far as the selection and filling out of standard forms involved the practice of law it was by the supreme court's permission that the brokers might continue the limited practice until the court might withdraw the permission. It was the court, not the board or its rule, which relaxed the prohibition against the practice of law by laymen and conferred upon brokers any right to continue such practice.

In like manner the Public Service Commission may countenance appearances before it by laymen but it may not by any rule or otherwise empower any person not licensed to practice law to practice it, or to grant immunity to one who does.

We hold, further, that the alleged lawfulness of respondent to engage in similar activities in other jurisdictions, such as in the State of Indiana or before the Interstate Commerce Commission, is immaterial in the case at bar. Respondent's activities in Wisconsin and his compliance or the lack of it with Wisconsin law are the controlling facts and the law applicable. Foreign bodies can no more authorize persons unlicensed in this state to practice law here than could the Public Service Commission of Wisconsin.

Respondent contends that by his study and experience he has become as well or better qualified than many licensed lawyers in the particular limited field in which he holds himself out to serve his clients, and his activities in that area should not be restrained. These practical qualifications in the instant case may be admitted without affecting the result. Beyond competency in a limited field the lawyer is subject to the discipline and control of the courts. There are obligations to his client and to the public under the supervision of the courts which are lacking in the case of any unlicensed person. We need not and we should not acknowledge a layman's right to practice law in a specialized field because the layman appears to be competent in it. Many an experienced legal secretary has qualifications in certain fields of the law superior to those of the newly-admitted law graduate but we do not consider it incumbent on the court to permit such an unlicensed expert to practice law in a specialty however narrow the specialty may be.

Neither do we think there is much virtue in respondent's disclaimer that he appears only before administrative agencies and never before any Wisconsin judicial tribunal or court. In the *Dinger Case, supra,* at p. 202, we expressly disavowed the language and thought,

> ". . . that the court's interest in and powers of regulation and control of the practice of the law do not embrace and include the activities of persons, not licensed as attorneys, who may practice law outside of actions and proceedings in court. On the contrary, we hold that such broad power over the practice of law is a judicial power vested in the courts by sec. 2, art. VII of the state constitution."

And in the same case we held, at p. 206:

". . . that the regulation of the practice of the law is a judicial power and is vested exclusively in the supreme court; [and] that the practitioner in or out of court, licensed lawyer or layman, is subject to such regulation; . . ."

As we said earlier in this opinion, in *Dinger, supra,* we should have said that the regulation is exclusively a judicial power, residing ultimately in the supreme court.

Respondent has contended that to restrain him from continuing his present practices before the P. S. C. infringes his constitutional right to due process of law and equal protection of the law. We do not find that the United States Constitution assures him of a right to practice law in this state without being duly licensed by this court to do so nor does it protect him if he attempts it.

Relator's complaint asserts:

"VII.

"The practice of law comprises among other things, the following:

"(a) The giving of legal advice and instruction to clients to inform them of their rights and obligations.

"(b) The preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laymen.

"(c) The appearance for clients before public tribunals which possess power and authority to determine the rights of such clients according to law, in order to assist in the proper interpretation and enforcement of law."

We concur in the statement by appellant regarding the practice of law, set forth in the complaint at VII (a) and (b) above, and respondent should be enjoined from continuing such activities. As to VII (c), the respondent should be enjoined from apearing as an advocate for a client in respect to the client's legal rights and to procure an adjudication of legal rights desired by the client.

We do not consider that a layman is engaged in the practice of law when he investigates facts or procures evidence pertinent to his client's situation or to make reports thereon or testify thereto before a court or an administrative tribunal, and he may hold himself out as available to do such things, but he may not advise his client or others concerning the rights or liabilities arising from his investigation. "Giving advice as to legal rights is clearly the function of lawyers." *State ex rel. Junior Asso. of Milwaukee Bar v. Rice* (1940), 236 Wis. 38, 54, 294 N. W. 550. The investigator may communicate to his employer an opinion obtained from an attorney but he may not communicate the opinion of an attorney as his own. *Rice Case, supra,* p. 38.

We recognize that one not a licensed lawyer may by familiarity with an industry, such as the trucking industry, possess or acquire knowledge of value to a client, and may be in a position to give much technical non-legal advice to his client in such matters which does not constitute the practice of law.

Appellant is not demanding a penalty for past infractions of the principles just mentioned. For the future, an injunction should issue restraining respondent:

(a) from the giving of legal advice and instruction to clients to inform them of their rights and obligations;

(b) from the preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laymen; and

(c) from appearing as an advocate asserting legal rights for a client before public tribunals which possess power and authority to determine the rights of such clients according to law.

By the Court.—Order reversed and cause remanded with directions to enter a restraining order not inconsistent with the opinion.

APPENDIX B

DECISION OF CIRCUIT COURT FOR WINNEBAGO COUNTY, WISCONSIN

September 6, 1961

STATE OF WISCONSIN, ex rel.,
STATE BAR OF WISCONSIN,

Plaintiff,

vs.

JOHN J. KELLER,

Defendant.

This is an action in the nature of quo waranto commenced by the Attorney General on relation of the State Bar of Wisconsin against the defendant, a layman, who is charged with usurping the franchise of practicing law by holding himself out to the public, and the trucking industry in particular, that he is engaged, among other things, in the business of making applications on behalf of others to the Public Service Commission of Wisconsin for authority to be granted to such applicants to conduct trucking operations, and to handle proceedings on behalf of truckers with respect to such applications, and to appear before that agency and other administrative agencies of the State of Wisconsin on behalf of members of the trucking industry to obtain permits of various kinds necessary to the operation of the trucking business, and to oppose, if desired, the granting of such permits to others. In the course of such representations defendant examines and cross-examines

witnesses before the Public Service Commission of the State of Wisconsin and takes such other steps and gives such counsel and advice as he deems necessary to make a record upon which formal action by the Commission determining the rights of others may be predicated.

Plaintiff contends that such representation by the defendant on behalf of applicant members of the trucking industry before the Public Service Commission and other administrative agencies in the State constitutes the practice of law by a non-lawyer.

The defendant by his answer to the amended complaint admits that he is not a lawyer (attorney) but contends that the services rendered by him for members of the trucking industrial before the Public Service Commission and other administrative agencies of the State of Wisconsin do not constitute the practice of law.

The plaintiff has demurred to the answer of the defendant, and the defendant, on the other hand, has moved for summary judgment of dismissal of the plaintiff's complaint.

There are no controverted issues of fact. A determination of the issues between plaintiff and defendant involves purely a determination of issues of law.

The matter was fully argued before this Court, and briefs have now been submitted. At the time of the oral arguments the Court on its own initiative raised the question of jurisdiction of a trial court to determine the issues involved, and invited counsel to submit briefs on such question. No question of jurisdiction of this trial court is raised by the pleadings. However, the question of jurisdiction is

one which need not be raised by the pleadings or by either of the parties to the litigation but is one which the Court may determine on its own incentive and its own motion. Unfortunately, the invitation of this Court to assist this Court on the jurisdictional question involved was overlooked or ignored in the briefs submitted.

DOES A TRIAL COURT (CIRCUIT COURT) HAVE JURISDICTION IN THIS MATTER?

A reading and somewhat careful study and analysis of the many cases cited in the submitted briefs—particularly those in the Suprueme Court of Wisconsin—leaves this Court with the feeling that the issues presented in the instant case are not ones for a trial court to determine; rather, that a determination of such issues as are here presented is one solely within the jurisdiction of the Supreme Court of Wisconsin.

The Court is not unmindful of the procedure followed in *State ex rel. Junior Association of Milwaukee Bar v. Rice* (1940), 236 Wis. 38, where a similar issue of the defendant's activity as a "claims adjuster" was challenged by action commenced in the Circuit Court of Milwaukee County. That case was one of widespread interest, involving policy as to what constitutes the practice of law. The Circuit Court took jurisdiction, and the matter went to the Supreme Court on appeal. This Court has had occasion to examine Cases and Briefs submitted in the *Rice Case, supra*, and at no point, from an examination of the record on appeal and briefs filed, as shown in Cases and Briefs,

does it appear that either party question the jurisdiction of the Circuit Court at any stage of the proceedings.

However, this Court on its own motion takes notice of rules of law applicable, though not raised by either party, and particularly the rule laid down in the leading case of *State ex rel. Gaudynski v. Pruss*, 233 Wis. 600, where the rule is briefly stated as follows:

> "Parties may not either by stipulations or an application of the principle of estoppel confer on a court jurisdiction over the subject matter which it never had or which it lost." (*Id.* p. 604)

In *Fox River Paper Company v. International Brotherhood*, 242 Wis. 113, the Court, in citing the *Gaudynski Case, supra*, uses this language:

> "'No principle of law is better established than that parties by agreement can not confer jurisdiction upon a court.'" (*Id.* p. 115)

In 21 C. J. S., Courts, p. 176, sec. 114, is found this statement:

> "A court is bound to take notice of the limits of its authority; and it is its right and duty to make a preliminary examination of its jurisdiction to entertain the cause, of its own motion, even though the question is not raised by the pleadings, or is not suggested by counsel. If the court finds at any stage of the proceedings that it is without jurisdiction, it is its duty to take proper notice of the defect by staying the proceedings, dismissing, or other appropriate action." (*Id.* pp. 175-176)

The substance of this citation as it appears in 15 C. J., Courts, p. 852, sec. 171, was approved by the Supreme Court of Wisconsin in *Brickley v. Neuling*, 256 Wis. 334.

As the Supreme Court of the United States stated in *Morris v. Gilmer*, 9 Sup. Ct. 289-292; 129 U. S. 315; 32 L. Ed. 690:

"This rule is inflexible and without exception."

In *Lathrop v. Donohue* (1960), 10 Wis. (2d) 230, action was commenced in the Circuit Court of Fond du Lac County by plaintiff to recover from the defendant as Treasurer of the State Bar of Wisconsin the sum of fifteen dollars ($15.00), paid by the plaintiff under protest to the defendant as Treasurer of the State Bar of Wisconsin, to cover his annual dues to the State Bar for the calendar year 1959 as a condition of the plaintiff continuing in the practice of law in this State. A demurrer to the complaint was interposed, one of the grounds being that the court (Circuit Court of Fond du Lac County) lacked jurisdiction over the subject matter of the action in that exclusive jurisdiction thereof was vested in the Supreme Court of the State of Wisconsin. The trial court filed a memorandum decision in which the facts and the legal authorities were carefully and comprehensively considered, and determined that the demurrer must be sustainted on all three grounds, including the jurisdictional ground of lack of authority of the Circuit Court of Fond du Lac County to determine the issues. In disposing of such matter, the Court, speaking through Justice Currie, page 234, says:

"This court has determined to consider the constitutional issue raised on its merits and not to dispose of the appeal upon procedural grounds.

> "While we are of the opinion that the learned trial court properly determined that the circuit court was without jurisdiction to pass upon the validity of an order of this court (Supreme Court) which regulates the practice of law, we will treat the action as though it had been originally and properly brought in this court. * * *".

In *State ex rel. John W. Reynolds, Attorney General, et al., petitioners, v. Julius J. Dinger, et al., as members of and constituting the Wisconsin Real Estate Brokers Board*, handed down by the Supreme Court of Wisconsin on June 27th, 1961, but which case does not have a citation at the time of this opinion being dictated, the Court makes this significant statement:

> "We conclude that R. E. B. Rule 504 includes provisions which permit to a limited extent the practice of the law by certain non-lawyers; that the regulation of the practice of the law is a judicial power and is vested exclusively in the supreme court; that the practitioner in or out of court, licensed lawyer or layman, is subject to such regulation; that whenever the court's view of the public interest requires it, the court has the power to make appropriate regulations concerning the practice of law in the interest of the administration of justice, and to modify or declare void any such rule, law or regulation by whoever promulgated which appears to the court to interfere with the court's control of such practice or such end * * *."

This court concludes that the latest expressions of the Supreme Court of Wisconsin in *Lathrop v. Donohue supra*, and in the *Real Estate Brokers Board Case, supra*, express the deliberate and considered view of the Supreme Court of Wisconsin that the promulgation of rules regulating the

practice of law is a function solely of the Supreme Court of Wisconsin and that such power so to regulate the practice of law is not vested in the trial courts in this state.

For these reasons, this Court is now of the view that the Circuit Court of Winnebago County has no jurisdiction to determine the issues presented in this action on their merits; and that it would be completely improper for the trial court to gratuitously express its opinion on the merits of the controversy between the parties to this lawsuit.

Counsel for defendant may present for signature the proper order dismissing the plaintiff's action upon the ground that the Circuit Court of Winnebago County has no jurisdiction in the matter. No costs will be allowed on such dismissal.

Dated this 6 day of September, 1961.

HELMUTH F. ARPS
Helmuth F. Arps
Circuit Judge

APPENDIX C

(Material Portions of Record)

ORIGINAL COMPLAINT

I.

3 The State Bar of Wisconsin is an association of all persons licensed to practice law in this state and said association was organized and created by order of the Wisconsin Supreme Court on December 7, 1956, 273 Wis. vii., and said association may sue and be sued.

II.

The defendant, John J. Keller, resides in the City of Neenah, Winnebago County, Wisconsin, and maintains an office at 201 West Wisconsin Avenue in said City of Neenah.

III.

By virtue of the Constitution heretofore duly adopted by the State of Wisconsin, there is created thereunder the Supreme Court. Now and at all times herein mentioned, and pursuant to said constitutional provisions, there
4 is organized, ordained and existing a duly constituted tribunal known as "Supreme Court of Wisconsin." Among other inherent powers within the exclusive domain of said Supreme Court of Wisconsin, is the determination of who may engage in the professional field known as the "Practice of Law." Among its inherent powers, said Supreme Court has the sole and exclusive right and privilege of saying who shall be licensed and permitted to engage in the practice of law; and as an aid in determining said

question, a number of duly constituted legislatures of this state have prescribed certain guides or laws defining who may be entitled to engage in the practice of law. The right to the practice of the law is by sufferance and at the will of the Supreme Court of Wisconsin, and may be terminated at any time for violations of certain laws, or for violations of any of the Canons of Ethics applying to and binding on members of the profession, or for any good cause shown. No other agency has either power or right to license anyone to engage in the practice of the law, except said Supreme Court, since authority to admit to the bar and to disbar necessarily carries with it the power to define what constitutes the practice of the law, and to exclude unauthorized persons from it.

IV.

Under the laws of this state and under the rules of the Supreme Court of Wisconsin only a person who has met the tests and qualifications as to training and moral character prescribed and established by law is entitled to practice law and when he has been admitted to practice he becomes an officer of the court subject to its discipline and supervisory control. The legislature of this state has enacted into law sec. 256.30 of the Wisconsin statutes, providing that every person, who without having first obtained a license to practice law as an attorney of a court of record of Wisconsin, as provided by law, shall practice law as therein defined, including holding himself out as authorized to practice law, the giving of professional legal advice in or out of court for pecuniary reward not incidental to his usual or ordinary business, or the rendering of any legal service for any other person, shall be

guilty of a misdemeanor in addition to his liability to punishment as for a contempt, and in addition, the courts of this state always have had and now have the inherent power to restrain and punish for contempt any person engaging in the practice of the law without first being licensed so to do.

V.

One of the purposes of bar associations, such as the relator here, is to safeguard the proper professional interests of the members of the bar to the end that the public may be served in legal matters by a professional class qualified to render such service by reason of education, training, experience, examination and ethical discipline, and that the public be protected from those who pretend to be equipped to render and do render services constituting the practice of law but who have not met the rigid requirements imposed upon licensed attorneys, and who are not subject to the discipline and supervisory control of the courts.

VI.

The defendant has never been admitted to the bar of the State of Wisconsin and has never been licensed to practice law in this state, but nevertheless has engaged in the practice of law systematically and continuously during the period of more than three years last past and is now so engaged, and thereby the defendant has wrongfully and illegally usurped and exercised a franchise, to wit, the privilege of practicing law. On information and belief during the period referred to the defendant has engaged in the

practice of law by holding to the public and the trucking industry in particular that he is engaged among other things in the business of making applications to the Public Service Commission of applications for authority to operate trucking operations, assignments, sales and purchases, the preparation of contracts and leases, the handling of cases with the various state departments, the obtaining of operating authority, fuel permits, or special permits in other
6 states, the providing of proper representation "at Madison and Washington" and the providing of a legal and administrative service center for the trucker. While on complaint of the plaintiff the defendant has agreed to discontinue such advertising he has nevertheless persisted and now persists in the practice of law by the drafting and filing of trucking eases with the Motor Carrier Division of the Public Service Commission of Wisconsin and by appearing for and representing truckers in hearings before such agency in the course of which he examines witnesses and takes such steps as he may deem necessary to make a record upon which formal action by said Commission adjudicating the rights of parties may be predicated. In addition thereto said defendant in the course of said practice issues legal opinions to his so-called "clients," and all of the aforesaid services have been and are being rendered for compenastion.

VII.

The practice of law comprises among other things, the following:

(a) The giving of legal advice and instruction to clients .o inform them of their rights and obligations.

(b) The preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laymen.

(c) The appearance for clients before public tribunals which possess power and authority to determine the rights of such clients according to law, in order to assist in the proper interpretation and enforcement of law.

All of the activities of the defendant as hereinbefore set forth in para. VI of this complaint come within the above classification of practice of the law and unless restrained by the court, the defendant will, by virtue of the acts, facts and circumstances hereinbefore set forth, in all probability continue in such practices. Said activities have been conducted openly and notoriously and in disregard of the rights of the public as well as those for whom and on whose behalf this action is brought.

7 WHEREFORE, the State of Wisconsin demands judgment adjudging that the defendant has unlawfully usurped a franchise, viz., the privilege of practicing law; ordering the defendant to cease and desist immediately and permanently from such illegal practice and requiring the defendant to pay the costs and disbursements of this action in addition to a fine of $2,000.00 as provided in Section 294.13, Wis. Stats., and for such other and further judgment, order or relief as under the circumstances may be just and proper.

DEMURRER

13 Comes now the defendant, by his attorney Frank M. Coyne, and demurrers to plaintiff's complaint on the following grounds and reasons:

(1) Defendant claims the Court lacks jurisdiction over the subject matter of the alleged activities of defendant insofar as they pertain to claim of defendant "obtaining special permits in other states"; "the providing of proper representation at . . . Washington" or, as they pertain to any alleged activities in respect to representing persons in, before, or about any administrative or legislative agencies or tribunals without the state of Wisconsin.

(2) Defendant claims the complaint does not state facts sufficient to constitute a cause of action for the reason that all alleged activities of defendant, other than those covered by (1) above, pertain to services in connection with administrative departments or tribunals of the State of Wisconsin; and for the further reason that there is no claim that the activities alleged were not incidental to defendants ordinary and usual business, to wit, licensed Interstate Commerce Practitioner in connection with transportation matters.

Dated November 4, 1960.

AMENDED COMPLAINT
(Formal Parts Omitted)

John W. Reynolds, Attorney General of the State of Wisconsin, brings this action in the name of the state against the above named defendant, upon complaint of the State Bar of Wisconsin, an association created by order of the Supreme Court of Wisconsin, which association consists of all persons licensed to practice law in the State of Wisconsin, and for cause of action alleges:

I.

The State Bar of Wisconsin is an association of all persons licensed to practice law in this state and said association was organized and created by order of the Wisconsin Supreme Court on December 7, 1956, 273 Wis. vii; and said association may sue and be sued.

II.

The defendant, John J. Keller, resides in the City of Neenah, Winnebago County, Wisconsin, and maintains an office at 201 West Wisconsin Avenue in said City of Neenah.

III.

By virtue of the Constitution heretofore duly adopted by the State of Wisconsin, there is created thereunder the Supreme Court. Now and at all times herein mentioned, and pursuant to said constitutional provisions, there is
16 organized, ordained and existing a duly constituted tribunal known as "Supreme Court of Wisconsin." Among other inherent powers within the exclusive domain of said Supreme Court of Wisconsin, is the determination of who

may engage in the professional field known as the "Practice of Law." Among its inherent powers, said Supreme Court has the sole and exclusive right and privilege of saying who shall be licensed and permitted to engage in the practice of law; and as an aid in determining said question, a number of duly constituted legislatures of this state have prescribed certain guides or laws defining who may be entitled to engage in the practice of law. The right to the practice of the law is by sufference and at the will of the Supreme Court of Wisconsin; and may be terminated at any time for violation of certain laws, or for violations of any of the Canons of Ethics applying to and binding on members of the profession, or for any good cause shown. No other agency has either power or right to license anyone to engage in the practice of the law, except said Supreme Court, since authority to admit to the bar and to disbar neessarily carries with it the power to define what constitutes the practice of the law, and to exclude unauthorized persons from it.

IV.

Under the laws of this state and under the rules of the Supreme Court of Wisconsin only a person who has met the tests and qualifications as to training and moral character prescribed and established by law is entitled to practice law and when he has been admitted to practice he becomes an officer of the court subject to its discipline and supervisory control. The legislature of this state has enacted into law Sec. 256.30 of the Wisconsin Statutes, providing that every person, who without having first obtained a license to practice law as an attorney of a court of record of Wisconsin, as provided by law, shall practice

law as therein defined, including holding himself out as authorized to practice law, the giving of professional legal advice in or out of court for pecuniary reward not in-
17 cidental to his usual or ordinary business, or the rendering of any legal service for any other person, shall be guilty of a misdemeanor in addition to his liability to punishment as for a contempt, and in addition, the courts of this state always have had and now have the inherent power to restrain and punish for contempt any person engaging in the practice of law without first being licensed so to do.

V.

One of the purposes of bar associations, such as the relator here, is to safeguard the proper professional interests of the members of the bar to the end that the public may be served in legal matters by a professional class qualified to render such service by reason of education, training, experience, examination, and ethical discipline, and that the public be protected from those who pretend to be equipped to render and do render services constituting the practice of law but who have not met the rigid requirements imposed upon licensed attorneys, and who are not subject to the discipline and supervisory control of the courts.

VI.

The defendant has never been admitted to the bar of the state of Wisconsin and has never been licensed to practice law in this state, but nevertheless has engaged in the practice of law systematically and continuously in the re-

spects hereinafter alleged during the period of more than three years last past and is now so engaged, and thereby the defendant has wrongfully and illegally usurped and exercised a franchise, to wit, the privilege of practicing law. On information and belief during the period referred to the defendant has engaged in the practice of law by holding out to the public and the trucking industry in particular that he is engaged among other things in the business of making applications to the Public Service Commission of Wisconsin for authority to conduct trucking operations and to handle proceedings on behalf of truckers with respect to such applications and to appear before that agency and other administrative agencies in the state or elsewhere on behalf of members of the trucking industry to obtain permits of various kinds necessary to the operation of the trucking business and to oppose, if desired, the granting of such permits to others. Plaintiff further alleges that in the course of such practice the defendant has at all times material hereto appeared in a representative capacity on behalf of members of the trucking industry in proceedings and hearings before the Wisconsin Public Service Commission and that in the course of such representation he has examined and cross-examined witnesses and has taken such steps as he deems necessary to make a record upon which formal action by said commission adjudicating the rights of parties may be predicated. Plaintiff alleges that in general defendant has at all times material hereto performed the services and engaged in the procedures and practices coming within the scope of Ch. PSC 2 of the administrative rules of said Public Service Commission as published in Vol. 5 of the Wisconsin Ad-

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ministrative Code and defendant claims the right to continue to do so unless lawfully restrained by a court of competent jurisdiction.

VII.

The practice of law comprises among other things, the following:

(a) The giving of legal advice and instruction to clients to inform them of their rights and obligations.

(b) The preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laymen.

(c) The appearance for clients before public tribunals which possess power and authority to determine the rights of such clients according to law, in order to assist in the proper interpretation and enforcement of law.

All of the activities of the defendant as hereinbefore set forth in para. VI of this complaint come within the above classification of practice of the law and unless restrained by the court, the defendant will, by virtue of the acts, facts and circumstances hereinbefore set forth, in all prob-
19 ability continue in such practices. Said activities have been conducted openly and notoriously and in disregard of the rights of the public as well as those for whom and on whose behalf this action is brought.

WHEREFORE, the State of Wisconsin demands judgment adjudging that the defendant has unlawfully usurped a franchise, viz., the privilege of practicing law; ordering the defendant to cease and desist immediately and permanently from such illegal practice and requiring the defend-

ant to pay the costs and disbursements of this action and for such other and further judgment, order or relief as under Ch. 294, Wis. Stats., or otherwise may be just and proper.

21 ANSWER TO AMENDED COMPLAINT

(Formal parts omitted)

COMES NOW the defendant by Frank M. Coyne, his attorney, and makes the following his answer to plaintiff's complaint.

(1) Admits the allegations of paragraphs I and II of plaintiff's complaint.

(2) Answering paragraph III, admits that the Supreme Court of Wisconsin has been created under the Wisconsin Constitution and is in existence; admits that said Supreme Court of Wisconsin does have a power to determine who may engage in the practice of law and that it may terminate a license or privilege given to anyone to practice law; denies, however that the Supreme Court of Wisconsin has the power, either inherently or otherwise, to exclusively determine what constitutes the practice of law.

(3) Answering paragraph IV and V, admits the allegations contained therein.

(4) Answering paragraph VI, admits that the defendant has not been admitted to the State Bar of Wisconsin as an attorney; admits that he has engaged in the specific activities set forth in said paragraph, to-wit; making
22 applications before the Public Service Commission of Wisconsin for authority to conduct trucking operations,

and otherwise appearing before said agency and other administrative agencies in connection with obtaining permits for operation of trucking business and the opposing of permits to others; admits that he has so appeared in a representative capacity and that in so doing he has examined and cross-examined witnesses and that he has performed services and engaged in the procedures and practices within the scope of PSC-2, Wisconsin Administrative Code; admits that he claims that he has the right to do so and denies that his participation in these activities constitutes the practice of law as prohibited by Wisconsin Statutes 256.30 or otherwise.

(5) Answering paragraph VII, admits that the practice of law can comprise, among other things, the items set forth in subparagraphs (a) and (b) but denies that these elements in themselves constitute the practice of law, alleging that they may be performed by persons other than lawyers under certain circumstances and within certain rights; and denies that appearance before "public tribunals" constitute the practice of law as defined and prohibited by Wisconsin Statutes 256.30.

AFFIRMATIVE DEFENSES

As and for separate affirmative defenses to the plaintiff's complaint the defendant alleges as follows:

(1) That the Supreme Court of the State of Wisconsin has the sole right and power to regulate and qualify those persons who participate in the administration of the law in actions and proceedings in courts of law and
23 equity; that the legislature of the State of Wisconsin has the sole right and power to regulate and qualify those persons who participate in the administration of the law in actions and proceedings outside of courts of law and equity under its police power in order to protect the public interest and welfare; that this separation of authority between the judiciary and the legislature is guaranteed by the separation of powers doctrine in the Wisconsin Constitution; that all of the activities of the defendant, as alleged in the plaintiff's complaint and admitted to by the defendant, constitute the administration of the law outside of courts of law and equity and are, thus, solely within the legislature's sphere of regulation.

(2) That the defendant is a duly licensed practitioner before the Interstate Commerce Commission of the Government of the United States in connection with matters pertaining to trucking and motor carrier operations; that in being so licensed, defendant was required to and did pass a written examination wherein his qualifications in respect to the knowledge of legal principles applicable to the trucking industry generally were inquired into, as well as the general rules of procedure and evidence governing the handing of matters before said commission; that the de-

fendant is well qualified to serve the public and in particular, the trucking industry, in the capacity and activities as alleged in the plaintiff's complaint.

(3) The defendant alleges that all activities which the plaintiff complains of against him were performed as a qualified layman and not an ordinary layman, and do not constitute the practice of law as defined and prohibited by Wisconsin Statutes Section 256.30.

24 (4) That the representation of clients in matters involving trucking in interstate commerce is the primary business of the defendant; that a considerable portion of the activities of the defendant in appearing before the Public Service Commission of Wisconsin and other administrative agencies of the State of Wisconsin, all as alleged in the plaintiff's complaint, involve the rendering of professional advice and service incidental to said defendant's lawful interstate business.

(5) The defendant alleges that all activities complained of in this complaint pertain to appearances before, or services in connection with, various administrative bodies of the State of Wisconsin; that the defendant has not and does not at any time whatsoever appear before any judicial tribunal or court of the State of Wisconsin, or any other state; that Chapter 195 Wisconsin Statutes and the Wisconsin Administrative Code specifically permits representation of people by agents other than attorneys before administrative agencies and that such representation does not constitute the practice of law as prohibited by Wisconsin Statutes Section 256.30.

(6) The defendant alleges that a determination, as plaintiff requests, that the defendant's alleged activities constitute the practice of law as defined by Wisconsin Statutes, or otherwise, would deny the defendant due process and equal protection of the law as guaranteed by the Wisconsin and the United States Constitutions in that it would be imposing a standard that is arbitrary and discriminatory with no reasonable relationship to the interests sought to be protected, and that it does not apply equally to all persons of the same class, to-wit: persons possessing equal qualifications.

WHEREFORE, the defendant prays that the plaintiff's complaint be dismissed with prejudice and without cost to either party.

FRANK M. COYNE
Attorney for Defendant

DEMURRER TO DEFENDANTS ANSWER TO AMENDED COMPLAINT

The plaintiff demurs to the defendant's Answer to the Amended Complaint and to all alleged defenses therein on the grounds that no defense is stated to the Amended Complaint herein.

29 MOTION FOR SUMMARY JUDGMENT
(Formal parts omitted)

COMES NOW the defendant by his attorney Frank M. Coyne and pursuant to Section 270.635 Wisconsin Statutes, and based upon the pleadings herein, affidavits annexed hereto and Wisconsin and United States law applicable thereto moves the court for judgment dismissing the plaintiff's complaint, and all causes of action thereunder on its merits.

Dated April 27, 1961.

30 AFFIDAVIT OF FRANK M. COYNE
(Formal parts omitted)

Frank M. Coyne, being first duly sworn on oath, deposes and states that he is attorney for the defendant herein; that he is familiar with all the pleadings on file herein and facts set forth in defendant's personal affidavit and that he believes that the plaintiff's action has no merit.

Dated April 27, 1961.

31 AFFIDAVIT OF JOHN J. KELLER
(Formal parts omitted)

John J. Keller, being first duly sworn on oath, deposes and states that he is the defendant herein and makes this affidavit in support of a motion for summary judgment.

(1) Affiant states that he is an adult resident of the

State of Wisconsin and maintain an office at 201 West Wisconsin Avenue, in the city of Neenah.

(2) Affiant states that his primary, usual and ordinary business is the representation of clients in connection with the transportation business in Interstate Commerce; that he has been licensed by the Interstate Commerce Commission of the United States Government to so represent such parties before said commission in all matters relating to transportation operations, he being so licensed on October 4, 1961 and being a member in good standing of said Commission's Bar since said date.

(3) Affiant states that in obtaining the aforementioned license to practice before said Interstate Commerce
32 Commission affiant was compelled to undergo a written examination as to his qualifications so to practice; that said written examination tested affiant's qualifications and knowledge as to (1) structure and history of the Interstate Commerce Act, as amended, and related acts, (2) the Commission's rules of practices, (3) the general rules of evidence, (4) the leading cases involving the Commerce Clause of the Constitution and the Interstate Commerce Act and their significance, and (5) the principles of legal ethics; that affiant passed said written examination, was issued his license and has practiced under it continuously to date.

(4) Affiant states that his representation of transportation clients in Interstate Commerce involves the preparation of applications for filing with that Commission, the appearance at hearings before said Commission with the presentation of appropriate facts to support granting of

such applications, the application of principles of evidence, cross-examination of witnesses and thorough knowledge of transportation operations and rules and regulations applicable thereto; that in addition, said practice, in interstate commerce, requires preparation and filing with the Interstate Commerce Commission of appropriate bilateral contracts, lease agreements, rate schedules, tariffs, registration of equipment and related documents; that the handling of all said matters and the preparation of all said documents before the Interstate Commerce Commission are matters for which he has been properly qualified and licensed by Interstate Commerce Commission.

(5) That in respect to appearances before the Public Service Commission of Wisconsin and the Motor Vehicle Department and other related administrative agencies in the State of Wisconsin, as are complained of in this
33 action, certain of his appearances, acts and activities are in direct continuance or completion of services rendered for said clients in interstate commerce, to wit, obtaining of conforming authority or compliance authority from the Public Service Commission and registration of equipment and preparation and filing of appropriate leases of equipment with the Motor Vehicle Department; that in respect to said appearances all are appearances and acts pertaining to his client's operations in interstate commerce with the applications, acts and activities being performed before the named administrative agencies of the State of Wisconsin being in furtherance of the completion of said interstate matters, and as such a part of affiant's usual and normal occupation.

(6) Affiant states that in connection with all other appearances before the Public Service Commission of Wisconsin or the handling of matters before the Motor Vehicle Department or any other administrative agency of the State of Wisconsin as complained of in this action, that all said appearances, acts or activities are limited strictly to the representations of parties in connection with the transportation business; that in said respect affiant states that the rules of procedure preparation of documents and regulations governing are very comparable to rules and regulations of the Interstate Commerce Commission; that he has openly appeared before the Public Service Commission of Wisconsin in respect to the representation of transportation clients for more than seven years and without any objection thereto; that he had during said period of time
34 prepared necessary documents pertaining to leasing of equipment, filing of rate schedules and tariffs and other documents as required by said Wisconsin administrative agencies; affiant states that he is thoroughly familiar with all rules, regulations and procedures governing all of the activities that he engages in before said administrative agencies and that he is thoroughly qualified and competent so to do.

(7) Affiant states that in connection with the activities complained of in this action in respect to the representation of transportation clients that he does not appear before any court of record, court commissioner or judicial tribunal in representation of a client in this State or elsewhere nor does he hold himself out to represent any client or party in any court or judicial tribunal of any type in this state or elsewhere.

(8) Affiant states that he had been licensed to appear before the Public Service Commission of Indiana under Rule V(d) of said commission Rules and Regulations concerning practice and procedure, and also been permitted to appear before other comparable regulatory bodies of several other states on transportation matters.

35 (9) Affiant states that all activities pertaining to representation of clients before the Public Service Commission, Motor Vehicle Department and other administrative agencies of the State of Wisconsin as complained of in this action were performed by him as a qualified practitioner and that a general legal education is not required to carry on said activities and that he is ready, willing and able to submit himself to examination as to qualifications in connection with and limited to the performance of the acts and activities complained of.

ORDER DISMISSING ACTION

(Formal parts omitted)

42 IT IS HEREBY ORDERED that the plaintiff's complaint be dismissed upon the ground that the Circuit Court of Winnebago County has no jurisdiction over the subject matter, no costs to be allowed.

Dated September 19, 1961, by the Court.

H. F. ARPS
Judge

45 NOTICE OF APPEAL TO WISCONSIN SUPREME COURT

(Formal parts omitted)

MOTION OF RESPONDENT

50 Comes now respondent, by his attorney, Frank M. Coyne and moves the Court as follows:

(1) Moves the court to strike issue Number 2 and argument thereon from appellant's brief on the ground that it is not properly before the court in that:

(a) The trial court has made no determination on said issue and therefore such is not appealable within this court's appellate jurisdiction.

(b) It is not properly before this court as a matter of original jurisdiction.

(2) Moves the Court dismiss appellant's appeal as to issue Number 1 and remand the matter to Circuit Court of Winnebago County for the reason that no dispute exists between appellant and respondent on said issue.

51 RULING ON MOTION

The motion to dismiss appeal is denied and the motion to strike a portion of the plaintiff's brief is denied, it appearing that upon plaintiff's appeal this court has jurisdiction to review the refusal of the circuit court to sustain plaintiff's demurrer to the answer and would, under sec. 274.12 (2), Stats., have jurisdiction to review the failure of the circuit court to grant defendant's motion for summary judgment.

MOTION FOR REHEARING
(Formal Parts Omitted)

Comes now the Respondent, by his attorneys, Frank M. Coyne and James E. Quackenbush and, pursuant to Rule 37 of the Rules of Practice In The Supreme Court, moves the Court for a rehearing of the above captioned matter, and reversal or modification of its decision of May 1, 1962 herein, for reasons to be stated in briefs to be submitted under Rule 39.

Dated May 14, 1962.

MOTION FOR REHEARING DENIED
(Formal Parts Omitted)

Motion for rehearing denied without costs.

APPENDIX D

Applicable Provisions of Wisconsin Constitution

ARTICLE IV

Section 1. The legislative power shall be vested in a senate and assembly.

ARTICLE V

Section 1. The executive power shall be vested in a governor, who shall hold his office for two years; a lieutenant governor shall be elected at the same time, and for the same term.

ARTICLE VII

Section 2. The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction. Provided, that the jurisdiction which may be vested in municipal courts shall not exceed in their respective municipalities that of circuit courts in their respective circuits as prescribed in this constitution; and that the legislature shall provide as well for the election of judges of the municipal coutrs as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit courts.

Section 3. The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state;

but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same.

Section 20. Any suitor, in any court of this state, shall have the right to prosecute or defend his suit either in his own proper person, or by an attorney or agent of his choice.

ARTICLE XIV

Section 13. Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.

Applicable Provisions of Wisconsin Statutes

227.01 (1) "Agency" means any board, commission, committee, department or officer in the state government, except the governor or any military or judicial officer of this state.

227.08 Each agency shall adopt rules governing the form, content, and filing of pleadings, the form, content and service of notices, the conduct of prehearing conferences, and other necessary rules of procedure and practice.

195.03 (1) (Applicable to Public Service Commission) The Commission shall have power to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings; and all hearings shall be open to the public.

194.20 Motor carriers operating in interstate and foreign commerce shall obtain certificates and licenses, amend-

ments thereto, and approval of the assignment thereof, as provided in ss. 194.23, 194.25 and 194.34, but the issuance thereof shall not be predicated upon findings in respect to public convenience and necessity. Certificates, licenses, amendments thereto and approval of assignments thereof which involve operations in interstate and foreign commerce may be denied by the commission if it finds that the record and experience of the applicant evinces a disposition to violate or evade the laws or regulations of the state applicable to the operations proposed by him.

194.03 (4) Motor carriers operating in interstate and foreign commerce shall obtain permits and display evidence thereof as required by the motor vehicle department in the same manner as is required of motor carriers operating in intrastate commerce.

251.08 The supreme court shall have and exercise an appellate jurisdiction only, except when otherwise specially provided by law or the constitution, which shall extend to all matters of appeal, error or complaint from the decisions or judgments of any of the circuit courts, county courts or other courts of record and shall extend to all questions of law which may arise in said courts upon a motion for a new trial, in arrest of judgment, or in cases reserved by said courts.

251.10 In addition to the writs mentioned in section 3 of Article VII of the constitution the supreme court shall have power to issue writs of prohibition, supersedeas, procedendo and all other writs and process not specially provided by statute which may be necessary to enforce the due administration of right and justice throughout the state; and any justice of said court in vacation shall, on good cause shown, have power to allow writs of error, supersedeas and certiorari, and also to grant injunctional orders.

256.30 (2) Every person who shall appear as agent, representative or attorney, for or on behalf of any other

person, or any firm, corpartnership, association or corporation in any action or proceeding in or before any court of record, court commissioner, or judicial tribunal of the United States, or of any state, or who shall otherwise, in or out of court for compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section.

274.09 (1) Appeals to the supreme court may be taken from the circuit courts unless expressly denied and also from the county courts except where express provision is made for an appeal to the circuit court and from any court of record having civil jurisdiction when no other court of appeal is provided. Appeals may be taken from interlocutory judgments.

274.09 (2) Said right of appeal applies to final orders and judgments rendered upon appeals from or reviews of the proceedings of tribunals, boards and commissions, and to final judgments and orders whether rendered in actions or in special proceedings without regard to whether the action or proceeding involves new or old rights, remedies or proceedings and whether or not the right to appeal is given by the statute which creates the right, remedy or proceeding.

Applicable Public Service Commission Rule

P. S. C. 2.32 (1) A person desiring to participate in a proceeding, whether on his own behalf or as an authorized agent or attorney shall enter his appearance by giving his name and address and the name of any party he represents and in what capacity he is employed by such party.

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In The

Supreme Court of the United States

October Term, 1962

No. 429

JOHN J. KELLER,

Petitioner,

vs.

STATE OF WISCONSIN ex rel.
STATE BAR OF WISCONSIN,
an association,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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JOHN J. KELLER,

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITATION TO OPINION BELOW

(May 1, 1962) 16 Wis. 2d 377, 114 N.W. 2d 796.

JURISDICTION

The judgment of the Wisconsin Supreme Court reversed the order of the trial court which dismissed the action on the defendant's motion for summary judgment and plaintiff's demurrer to the answer, upon the grounds that the trial court had no jurisdiction in unauthorized practice of law cases because exclusive jurisdiction of such matters is vested in the State Supreme Court.

In its opinion the Wisconsin Supreme Court held that the regulation of the practice of law is vested in the courts by the state constitution with the ultimate exercise of control being vested in the Supreme Court, legislative enactments to the contrary notwithstanding. It also held that foreign bodies cannot authorize unlicensed persons to practice law in Wisconsin and that the alleged lawfulness of engaging in activities amounting to the practice of law in other jurisdictions, such as in another state or before the I.C.C. cannot confer the right to so practice before state administrative agencies in Wisconsin.

CONSTITUTIONAL AND ADMINISTRATIVE REGULATIONS INVOLVED

ARTICLE I, SEC. 8, UNITED STATES CONSTITUTION,

reading in part:

"The Congress shall have power • • • to regulate commerce with foreign nations, and among the several states, • • •."

ARTICLE XIV, SEC. 1, AMENDMENTS TO THE UNITED STATES CONSTITUTION,

reading in part:

"• • • No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person within its jurisdiction the equal protection of the laws."

VOL. 5, WISCONSIN ADMINISTRATIVE CODE PUBLIC SERVICE COMMISSION RULES, CHAPTER PSC 2.80 (2),

reading:

"PSC 2.80 Applications for motor carrier authority and assignment thereof. * * *

"(2) Applications for authority or assignment of authority to engage in intrastate commerce by motor vehicle shall not be combined with applications for state authority or assignment thereof to engage in operations in interstate commerce requiring a certificate or permit under the Federal Motor Carrier Act of 1935 (Sections 194.03 (5) and 194.20, Wis. Stats.). In such cases separate applications must be filed and separate filing fees paid."

QUESTIONS PRESENTED

The respondent does not agree with the petitioner on the scope of the questions presented and as set forth by petitioner at pages 2 and 3 of his brief.

First Question

Petitioner states the first question as follows:

"I. Can a state, without violating Article I, Section 8, of the United States Constitution, limit or deny a federally licensed I.C.C. practitioner's right to engage in federally authorized I.C.C. activities within that state solely because such practitioner is not licensed by that state to practice law therein?"

Reference should be made at this point to the allegations of Paragraph VI of the amended complaint as set forth at pages 32a - 34a of petitioner's brief.

It will be noted that the petitioner was charged with two things, - first, as holding himself out to the public as being engaged in certain practices and secondly, as actually engaging in certain practices.

It was alleged that he held himself out as being engaged in the practice of making applications to the Wisconsin Public Service Commission (hereinafter referred to as P.S.C.) for authority to conduct trucking operations and to handle proceedings on behalf of truckers with respect to such applications and to appear before that agency and other administrative agencies in the state or elsewhere on behalf of members of the trucking industry to obtain permits of various kinds necessary to the operation of the trucking industry and to oppose, if desired, the granting of such permits to others.

This was in effect the holding out of the petitioner as being engaged in a broad spectrum of activities constituting in the aggregate the practice of law.

However, when it came to allegations relating to the actual activities of the petitioner the respondent carefully refrained from charging the petitioner with the performance of any activities outside the state or with practice before the Interstate Commerce Commission (hereinafter referred to as the I.C.C.) within the state or elsewhere.

The respondent merely alleged that the petitioner in the scope of his practice "appeared in a representative capacity on behalf of members of the trucking industry in proceedings and hearings before the Wisconsin Public Service Commission and that in the course of such representation he has examined and cross-examined witnesses and has taken such steps as he deems necessary to make a record upon which formal action by said commission adjudicating the rights of the parties may be predicated. Plaintiff alleges that in general defendant has at all times material hereto performed the services and engaged in the procedures and practices coming within the scope of Ch. PSC 2 of the administrative rules of said Public Service Commission as published in Vol. 5 of the Wisconsin Administrative Code and defendant claims the right to continue to do so unless lawfully restrained by a court of competent jurisdiction." (p. 33a - 34a petitioner's brief)

At no time in either the trial court or appellate court was it contended by respondent that the petitioner should be excluded from performing activities permitted under his I.C.C. license, nor has the record as yet gone back to the trial court for the entry of a specific injunction along the lines outlined by the Wisconsin Supreme Court in its opinion and as set forth in 16 Wis. 2d 377, 389-90 (petitioner's brief 16a).

Hence Question I as stated by the petitioner is not reached in this case, and the commerce clause of Article I, Section 8, United States Constitution, is not involved.

Questions II, III, and IV

In each of these questions as stated by petitioner reference is made to engaging "in state administrative agency transportation activities." To be accurate these words should read "in those state administrative agency transportation activities which the state supreme court defines as constituting the practice of law."

It was nowhere contended by respondent that every activity which takes place in a state administrative agency regulating transportation constitutes the practice of law, and this was made abundantly clear by the Wisconsin Supreme Court when it expressly said:

> "We do not consider that a layman is engaged in the practice of law when he investigates facts or procures evidence pertinent to his client's situation or to make reports thereon or testify thereto before a court or administrative tribunal, and he may hold himself out as available to do such things, but he may not advise his client or others concerning the rights or liabilities arising from his investigation." 16 Wis. 2d 377, 389 (Petitioner's brief 15a).

It is accordingly submitted that questions II, III, and IV should be modified as indicated above.

Question V

As stated by petitioner this question reads:

> "V. Can a state court, without violating equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution, permit one profession

to practice law without a license and yet prohibit another profession from practicing law because it does not have a license?"

This question is misleading as stated and to be accurate should read:

> "Can a state court, without violating equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution, permit non-lawyers to perform certain services which amount to the practice of law while prohibiting the performance of certain other services which also constitute the practice of law?"

By question V petitioner is seeking to point up what he believes to be an inconsistency between the Wisconsin Supreme Court's decision in *State ex rel. Reynolds v. Dinger* (1961) 14 Wis. 2d 193, 109 N.W. 2d 685, and the instant case.

In the *Dinger* case the court upheld a rule of the state real estate brokers' licensing agency. This rule authorized the drafting of certain conveyances by licensees even though the court considered this to constitute the practice of law. However, the court made it clear that the rule had no validity so far as it affected the practice of law but that the practice had long been permitted without objection by the courts or the bar and it had worked reasonably well. Nevertheless, the court emphasized that when, as, and if, it should ever consider the practice should be discontinued it would be time for the court to use its power regardless of the real estate broker licensing law or any rule adopted by the board.

It is too clear to call for any argument that the existence or absence of a licensing law had nothing to do either with the *Dinger* case or this case, since in both cases the court relied on the exclusive power of the courts to define and regulate the practice of law, legislative enactments to the contrary notwithstanding.

Hence, it is not proper to make the problem attempted to be stated in Question V dependent upon the presence or absence of a licensing law.

There is no objection to a question which goes into the power of a state supreme court under the 14th Amendment to permit laymen to perform certain acts which constitute the practice of law while denying them the right to perform other acts which also constitute the practice of law. However, as will be pointed out later, this question has already been met in the United States Supreme Court so that certiorari should not be granted in this case.

REASONS FOR DENYING THE WRIT

I. THE COMMERCE PROVISION OF ARTICLE I, SECTION 8, UNITED STATES CONSTITUTION IS NOT INVOLVED IN THIS CASE.

Petitioner devotes considerable space in his brief to the scope of his admission to practice before the I.C.C.

It is respectfully submitted that this has nothing to do with the case. As previously pointed out in discussing the "Questions Presented" in petitioner's brief there were no

allegations in the amended complaint relating to petitioner's practice before the I.C.C. The petitioner did not in his pleadings nor in his brief here disclose that he has ever appeared in an I.C.C. hearing in the State of Wisconsin or that any question of his right to so appear has ever been raised by the respondent.

What he is seeking to do is to convert his I.C.C. permit or license into an authorization to practice law before the Wisconsin P.S.C. on the basis of the argument that I.C.C. practice is incidentally involved in such practice.

As a matter of fact the two practices are entirely separate and distinct as is recognized by the Rule PSC 2.80 (2) of the P.S.C. which reads:

> "PSC 2.80 Applications for motor carrier authority and assignment thereof. * * *
>
> "(2) Applications for authority or assignment of authority to engage in intrastate commerce by motor vehicle shall not be combined with applications for state authority or assignment thereof to engage in operations in interstate commerce requiring a certificate or permit under the Federal Motor Carrier Act of 1935 (Sections 194.03 (5) and 194.20, Wis. Stats.). In such cases separate applications must be filed and separate filing fees paid."

The P.S.C. is not an arm or agency of the I.C.C. and the scope of the federal permit does not extend to practicing law before the P.S.C. or otherwise in the State of Wisconsin.

There are a number of cases very much in point.

One of these is *Chicago Bar Assoc. v. Kellogg* (1949) 338 Ill. App. 618, 88 N.E. 2d 519.

There the defendant was registered as a patent attorney with the United States Patent Office and maintained an office in Chicago. He was not licensed to practice law in Illinois. In the course of his activities and among other things he repeatedly construed patent licenses and gave opinions with respect to the infringement of patents. He also wrote letters charging a company with patent infringement.

Defendant made the contention that he has a constitutional right to perform and render all services pertaining to patents and trademarks which are incidental to the license issued to him by the U.S. Patent Office, a position comparable to that taken by the petitioner here in connection with his Interstate Commerce Commission lic nse.

The court took the view that the courts of the state of Illinois have the power to determine what contravenes its policy independent of any other authority saying at p. 523:

> "The fallacy of defendant's argument lies in the implication that the Patent Office had the right to permit the exercise of prerogatives which are forbidden under the laws of the State of Illinois as constituting unauthorized practice. No such authorization was issued by the United States Patent Office to defendant, nor was any power inherent in the Patent Office to permit defendant to practice law. * * *
>
> "* * * The Patent Office did not undertake to invest non-attorneys with the same rights, privileges, and duties as those had by attorneys at law in contravention

of the well defined rulings of the courts of Illinois. The police power and the procedure thereunder covering the enrollment and disbarment of lawyers and the punishment of unauthorized practitioners subject to its jurisdiction is a matter reserved for determination by the Judicial Department of the State of Illinois."

One of the provisions of the trial court's injunctional order was to restrain the defendant from "Participating as an attorney in legal proceedings other than United States Patent Office."

With respect to this the appellate court stated that while the defendant has the same right to appear as a witness in a legal proceeding as any other technical expert he nevertheless had no right whatsoever to participate as an attorney at law.

With reference to the fact that the defendant used forms provided for by the U.S. Patent Office for preparing certain papers, including the assignment of patents, licenses for royalty, etc., the court said that the use of such forms was not controlling upon the question of whether or not he was engaged in the practice of law.

The court made it clear that the defendant should not be enjoined as to matters coming before the U.S. Patent Office, but concluded that he should be enjoined from participating in 8 different types of activities, one of which is particularly pertinent here, as follows:

"4. Preparing, drafting and filing pleadings and other legal documents and papers in suits at law and in equity, in courts of record *and before administrative*

tribunals, other than the Patent Office." (p. 527.) (Emphasis supplied.)

By the same token in the instant case the fact that the petitioner is a registered Interstate Commerce Commission practitioner does not *authorize* him to prepare pleadings before the Public Service Commission of Wisconsin nor to participate as an attorney does in hearings before that agency. Whatever special talents and expertise he may have mastered in trucking operations can be fully utilized by calling him as an expert witness, but only a licensed attorney may make the record by examination and cross-examination of witnesses, making the proper objections and arguments on points of evidence and by making oral or written arguments before that agency.

Another case in point here is *Petition of Kearney* (Fla. 1953) 63 S. 2d 630.

There the petitioner was a resident of Florida, a member of the United States Supreme Court Bar, the Tax Court of the United States and was authorized to practice before the United States Treasury Department.

He wanted to practice in Florida limiting his appearance as "Federal Tax Counsel" to the Federal Courts and department named above. He petitioned the court to be advised whether or not such practice is within the jurisdiction of the State Courts or is within the exclusive jurisdiction of the Federal Courts and Commissioners before whom he proposed to practice. The court referred his petition to the Florida Bar Committee on Unauthorized

Practice and requested findings of fact and law including recommendations.

The committee found that the proposed practice was not governed exclusively by rules of the United States Courts and Departments but that the Florida Supreme Court had jurisdiction over the petitioner and that he was required to have a Florida license.

This was approved by the court which said at p. 630:

> "The American Bar Association is committed to like policy and holds, as do many states, that practice before the Tax Court and Treasury Department of the United States may constitute the practice of law which may be enjoined if attempted by one not admitted to practice. In the matter of New York County Lawyers Association (In re Bercu) 273 App. Div. 524, 78 N.Y.S. 2d 209, 9 A.L.R. 2d 787; Gardner v. Conway, 234 Minn. 468, 48 N.W. 2d 788; People ex rel. Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N.E. 2d 941, 111 A.L.R. 1; Stack v. P.G. Garage, Inc., 7 N.J. 118, 80 A. 2d 545."

The court accordingly concluded that petitioner must qualify to practice law in Florida if he would engage in the practice he contemplates.

The case of *In re Roel* (1957) 3 N.Y. 2d 224, 144 N.E. 2d 24; appeal dismissed 355 U.S. 604, is very similar and appropriate here.

The appellant in that case was a Mexican lawyer not admitted to practice in New York but advertised as a Mexican lawyer. At his office he advised members of the public on Mexican law, including Mexican divorce law,

acted as a consultant to members of the Mexican bar on legal matters, and testified as an expert witness on Mexican law in the New York Courts. He did not give any advice on New York law.

The court held that his activities constituted the practice of law, saying at p. 26:

"• • • We are here examining the nature of the activities performed by appellant, not the sources of authority of the law which he practices. Whether a person gives advice as to New York law, Federal law, the law of a sister state, or the law of a foreign country, he is giving legal advice."

The court went on to say at p. 28:

"In the present case we are dealing with the conduct of a person who renders legal services to the public as a business. While it is true that he renders only specialized services dealing with a field in which he claims to be peculiarly competent, the competence of appellant in the practice of his specialty is not dispositive of the case before us. In many fields of endeavor laymen acquire specialized knowledge which is relevant to the practice of law in that area. Thus accountants may know a great deal about tax law and labor relations consultants much about labor law. A specialized area of competence does not, however, entitle these laymen to engage in the business of giving legal advice based on their knowledge of the subjects. A foreign lawyer who is familiar with the law of the country in which he is a lawyer is in a similar position. He is a specialist in a particular field of the law, but is nevertheless a layman in this State when he is not a member of the Bar here."

The court pointed out that a New York lawyer could not in a disciplinary proceeding plead in defense that the matter involved related to New Jersey or Connecticut law which is a matter outside the jurisdiction of the New York court, and "• • • A foreign law specialist, • • • is not subject to discipline; he need not be a lawyer of any jurisdiction; he may be without good character; and his activities may not even be regulated under the present state of the law."

The latest case involving the principle that a federal permit or license confers no right to practice law other than before the federal agency involved is that of *State of Fla. ex rel. Fla. Bar v. Alexander T. Sperry* (Apr. 4, 1962, rehearing denied May 16, 1962) 140 S. 2d 587.

This case involved the activities of a person licensed to practice by the United States Patent Office. He held himself out to the public as a patent attorney although he was not licensed to practice law in Florida. He maintained an office in Tampa, rendered opinions on patentability and opinions as to whether or not patent rights are being infringed. He prepared various legal instruments, including contracts, applications and amendments to applications for patents and prepared briefs and authorities with points of law relating thereto.

With respect to the scope of the practice permitted by the defendant's admission to practice before the United States Patent Office the Florida Supreme Court had this to say: (pp. 594-5)

"While we agree that each of the federal courts and each of those federal agencies which are authorized by Congress to do so may determine who shall be permitted to practice before them, we do not agree that such authority in any way gives those bodies the authority also to determine that those licensed by it have the right to practice law, in the particular field involved, within the borders of this state.

"It may well be that this state may not prohibit any person from appearing and practicing law before a federal court or agency in this state, if he be licensed by the federal court or agency, even though such person not be a member of the Bar of this state. But appearing before such bodies is an entirely different thing from a person holding himself out in this state as qualified to practice law before such federal bodies, maintaining an office in this state for that practice, and doing in this state the many things that are necessary to be done preparatory to the actual appearance before such bodies.

"For example, if a United States Court of Appeals conducts sessions in this state attorneys from other states, not licensed to practice in this state, could not be prohibited from arguing before that court in this state, but they would not be permitted to establish an office and hold themselves out in this state as qualified to practice before the federal court unless they were first admitted to the Bar of this state. The Kearney case, 63 So. 2d 630, supra, settled this point directly.

"If we were to hold otherwise any person licensed to practice before the United States Supreme Court or any other federal court could establish an office and hold himself out in this state as being qualified to represent

Florida citizens before those courts without this state having any control over their right to so hold themselves out, or any control over their actions.

"As a further example, if the federal district courts in this state were to license non-lawyers to practice before them, these non-lawyers, under the rule contended for by respondent, would have the right to establish an office in this state and to hold themselves out to the citizens of this state as qualified to practice law before such courts and this state would be powerless to protect its citizens in the matter.

"Fortunately no such dispute has yet arisen between the states and the federal courts and it is hoped that it never will. Generally speaking the federal courts permit only duly admitted lawyers to practice before them and the matter of determining whether persons shall be admitted to the Bar has been left to the states. It appears that it is only in the federal quasi-judicial and administrative agencies, such as the Patent Office, that the non-lawyer is licensed to practice.

"As above stated, we have no argument with the power of such agencies to determine who shall practice before them, but we do not agree that their licensing of a non-lawyer is in anywise to be taken as proof that the work done before them is not the practice of law or that one licensed by them has the right by virtue of said license to hold himself out as qualified to do those things in this state."

II. THE FACT THAT THE PETITIONER MAY HAVE PRACTICED BEFORE THE P.S.C. FOR SEVERAL YEARS AND MAY BE QUALIFIED TO PERFORM THE ACTS HE HAS BEEN DOING CONFERS NO RIGHTS UPON HIM UNDER AMENDMENT XIV OF THE UNITED STATES CONSTITUTION.

Petitioner argues that he is in fact qualified to practice before the P.S.C. and has done so openly for many years which grants him vested rights that may not now be disturbed without violating vested property rights, citing *Dobbins v. Los Angeles* (1904) 195 U.S. 223 as controlling.

This is so unsound that it calls but for brief argument.

As was said by the Florida Supreme Court in *State v. Sperry*, supra, at p. 596:

> "[10] The right to practice law is not a privilege or immunity of a citizen of the United States within the meaning of the Fourteenth Amendment to the Constitution of the United States. West Virginia State Bar v. Earley, 109 S.E. 2d 420, supra, Ginsburg v. Kovrak, 1958, 392 Pa. 143, 139 A. 2d 889, appeal dismissed 358 U.S. 52, 79 S. Ct. 95, 3 L.Ed. 2d 46. See also Petition of Florida State Bar Association, 186 So. 280, supra."

The effect of a long standing custom of practice of law by laymen was effectively laid at rest by the Arizona Supreme Court in the case of *State Bar of Ariz. et al. v. Ariz. Land Title and Trust Co. et al.* (Nov. 1, 1961) 366 P. 2d 1. Among other things this case involved the practice of law by real estate brokers in the drafting of various types of legal documents.

The Arizona court had this to say about the so-called prescriptive right to practice law arising out of long continued custom:

> "This is tantamount to saying 'We have been driving through red lights for so many years without a serious mishap that it is now lawful to do so.' The fact that these practices have continued for many years and have been acquiesced in by the bar does not make such activities any less the practice of law. It seems fair to assume that the public is relatively unaware of the evils inherent in this situation, or at least ignorant of the fact that they are not adequately represented in the average land transaction. It is apparent that the bar has been remiss in allowing the present custom to develop unabated. It is true that the record does not disclose any testimony regarding specific injury to the public from appellees' practices. However, in the sphere which encompasses the regulation of the practice of law, it is not merely this Court's function to redress past injury but to prevent harm in the future as well. Thus, neither the public's blissful acquiescence nor the bar's confessed lethargy can clothe the activities with validity. There is no prescriptive right to practice law and appellees have acted 'at their peril' since the time when the practices condemned here were initiated. Keyes Co. v. Dade County Bar Ass'n, S.C. Fla., So. 2d 605 (1950); Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 287 N.W. 377 (1939); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 Atl. 139 (1935). • • •" (p. 13).

If technical competence alone were the test many a disbarred attorney and many a top-flight surgeon whose licenses were revoked for reasons having no relationship to professional skills, would still be in practice and could not be deprived of "vested" rights.

III. PETITIONER'S PRACTICE BEFORE P.S.C. DOES CONSTITUTE THE PRACTICE OF LAW AND AS SUCH IS SUBJECT TO THE INHERENT CONTROL OF THE WISCONSIN SUPREME COURT.

Petitioner contends that practice before a state administrative agency does not constitute the practice of law.

This contention, of course, constituted the gist of the lawsuit on the merits, and respondent will do no more here than to cite the authorities which were successfully relied upon in the Wisconsin Supreme Court as establishing the proposition that such practice is the practice of law.

Clark v. Austin (1937) 340 Mo. 467, 101 S.W. 2d 977. (Practice as in instant case before state P.S.C.)

State ex rel. Johnson v. Childe (1946) 147 Neb. 527, 23 N.W. 2d 720. (Same type of practice)

Blair et al. v. Motor Carriers Service Bureau, Inc. (1939) 40 Pa. Dist. and County Reports 413. (Same type of practice)

People ex rel. Chicago Bar Assoc. v. Goodman (1937) 366 Ill. 346, 8 N.E. 2d 941, 111 A.L.R. 1, certiorari denied by United States Supreme Court, 302 U.S. 728. (Practice before state industrial commission)

Chicago Bar Ass'n v. United Tax Payers of America (1942) 312 Ill. App. 243, 38 N.E. 2d 349. (Tax refunds before department of finance)

In re Unauthorized Practice of Law in Lucas County (1955) Ohio Court of Common Pleas, 160 N.E. 2d 423. (Unemployment Compensation practice)

Goodman v. Beall (1936) 130 Ohio St. 427, 200 N.E. 470. (Industrial Commission practice)

McMillen v. McCahun (1960) Sauk County Ohio Court of Common Pleas, 167 N.E. 2d 541. (Industrial Commission practice)

State ex rel. Daniel v. Wells (1939) 191 S.C. 468, 5 S.E. 2d 181. (Industrial Commission practice)

West Va. State Bar v. Earley (1959 W. Va.) 109 S.E. 2d 420. (Industrial Commission practice)

Stack v. P.G. Garage, Inc. (1951) 7 N.J. 118, 80 A. 2d 545. (Reduction of taxes before county tax board)

Fred J. Hofmeister, et al. v. Edward M. Tod (1961 Mo.) 349 S.W. 2d 5. (Practice before Workmen's Compensation Commission)

In every one of these cases it was made clear that appearing for others in a representative capacity before state administrative agencies constitutes the practice of law.

IV. THE STATE SUPREME COURT HAS THE INHERENT POWER TO DEFINE AND REGULATE THE PRACTICE OF LAW AND THE FACT THAT IT PERMITS LAYMEN TO PERFORM CERTAIN ACTS WHICH TECHNICALLY CONSTITUTE THE PRACTICE OF LAW DOES NOT DENY EQUAL PROTECTION OF THE LAWS TO PERSONS WHO ARE NOT PERMITED TO PERFORM CERTAIN OTHER ACTS CONSTITUTING THE PRACTICE OF LAW.

Petitioner contends that he is being denied the equal protection of the laws because the Wisconsin Supreme

Court in *State ex rel. Reynolds v. Dinger* (1961) 14 Wis. 2d 193, 109 N.W. 2d 685, saw fit not to interfere with the drafting of certain conveyances by real estate brokers although conceding that this constitutes the practice of law.

If the Wisconsin Supreme Court had seen fit to permit some real estate brokers to engage in this practice while denying the privilege to others or if it saw fit to permit some laymen to practice before the P.S.C. and not others such as the petitioner, there might be some merit to petitioner's contention.

However, there has been no such discrimination. Each member of each group is accorded equal treatment.

It should also be noted that in the case of the real estate brokers the drafting of legal instruments was but an incident to the lawful business of selling real estate, whereas in the case of the petitioner the principal business is that of appearing for others in a representative capacity before a tribunal empowered to adjudicate valuable rights and before whom the record for purposes of court review is made.

While some state supreme courts have gone so far as to close both the field of conveyancing and the field of practice before state administrative agencies from lay practice, the Wisconsin Supreme Court has not seen fit thus far to do so. If all lay practice be viewed as an evil, no constitutional rights are impaired merely because the courts have not seen fit to correct all of the evil so long as there is no discrimination between members of the same class.

It is well recognized that a state may, without denial of equal protection of the laws, classify business and occupations for purposes of regulation, provide different rules for different classes, limit a regulation to a particular kind of business, extend to some persons privileges denied to others, or impose restrictions on some but not on others, where the classification or discrimination is based on real differences in the subject matter, and where the classification or the discrimination is reasonable and affects alike all persons pursuing the same business under the same conditions. See 16A C.J.S. Const. Law §510, pp. 338-339.

Petitioner has pointed to no authority to the effect that real estate brokers and lay practitioners before administrative tribunals must receive equal treatment so far as classification and regulation are concerned.

By the great and overwhelming weight of authority the judicial department is the sole arbiter of what constitutes the practice of law and it has the inherent power to control and prevent the unauthorized practice of law.

Fitchette v. Taylor (1934) 191 Minn. 582, 254 N.W. 910.

People ex rel. Chicago Bar Assoc. v. Goodman (1937) 366 Ill. 346, 8 N.E. 2d 941, 111 A.L.R. 1, certiorari denied by United States Supreme Court, 302 U.S. 728.

Arkansas Bar Ass'n v. Union Nat'l Bank (1954) 224 Ark. 48, 273 S.W. 2d 408.

State Bar Ass'n v. Connecticut Bank & Trust Co. (Conn. 1958) 140 A. 2d 863.

People ex rel. Illinois State Bar Ass'n v. Peoples Stock Yards State Bank (1931) 344 Ill. 462, 176 N.E. 901.

Bump v. District Court (1942) 232 Iowa 623, 5 N.W. 2d 914.

Opinion of the Justices (1935) 289 Mass. 607, 194 N.E. 313.

Opinion of the Justices (1932) 279 Mass. 607, 180 N.E. 725.

Curry v. Dahlberg (1937) 341 Mo. 897, 110 S.W. 2d 742.

Gardner v. Conway (1951) 234 Minn. 468, 48 N.W. 2d 788.

In re Baker (1951) 8 N.J. 321, 85 A. 2d 505.

New Jersey State Bar Ass'n v. Northern N.J. Mtg. Asso. (1956) 22 N.J. 184, 123 A. 2d 498.

Land Title Abstract & Trust Co. v. Dworken (1934) 129 Ohio St. 23, 193 N.E. 650.

Rhode Island Bar Ass'n v. Automobile Service Ass'n (1935) 55 R.I. 122, 179 Atl. 139.

In re Morse (1924) 98 Vt. 85, 126 Atl. 550.

Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n (1937) 167 Va. 327, 189 S.E. 153.

Washington State Bar Ass'n v. Washington Ass'n of Realtors (1952) 41 Wash. 2d 697, 251 P. 2d 619.

Hulse v. Criger (1952) 363 Mo. 26, 247 S.W. 2d 855.

Lowell Bar Ass'n v. Loeb (1943) 315 Mass. 176, 52 N.E. 2d 27.

Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n (1957) 135 Colo. 398, 312 P. 2d 998.

Clark v. Austin (1937) 340 Mo. 467, 101 S.W. 2d 977.

State ex rel. Hunter v. Kirk (1937) 133 Neb. 625, 276 N.W. 380.

Judd v. City Trust & Savings Bank (1937) 133 Ohio St. 81, 12 N.E. 2d 288.

Lathrop v. Donohue (1960) 10 Wis. 2d 230, 102 N.W. 2d 404, 367 U.S. 820.

State ex rel. Reynolds v. Dinger (1961) 14 Wis. 2d 193, 109 N.W. 2d 685.

State ex rel. State Bar v. Keller (1962) 16 Wis. 2d 377, 114 N.W. 2d 796.

CONCLUSION

The basic issue in the lawsuit was whether a layman may solicit and render the service of representing others before a state administrative agency, file pleadings and briefs, examine and cross-examine witnesses, furnish legal advice and hold himself out as being qualified to do so.

The attempt to drag in his I.C.C. license can be viewed only as an effort to muddy the waters and inject a federal issue where none really exists.

So far the United States Supreme Court has rejected all petitions for writs of certiorari in cases involving unauthorized practice of law.

People ex rel. Chicago Bar Assoc. v. Goodman (1937) 366 Ill. 346, 8 N.E. 2d 941, 111 A.L.R. 1, certiorari denied 302 U.S. 728.

Arkansas Bar Assoc. et al. v. Block et al. (Ark. 1959) 323 S.W. 2d 912, certiorari denied 361 U.S. 836.

Also in the case of *Roel v. New York County Lawyers Assoc.* (1957) 3 N.Y. 2d 224, 144 N.E. 2d 24, the bar association's motion to dismiss the appeal was granted and the appeal was dismissed for want of a substantial federal question, 355 U.S. 604.

Such disposition of petitions for writ of certiorari and attempted appeals are, of course, in line with the generally held view that a state acting under its police power has the right to define the practice of law and to determine who is qualified to practice within its borders.

See:

State v. Sperry (1962 Fla.) 140 S. 2d 587, 595.

Chicago Bar Assoc. v. Kellogg (1949) 338 Ill. App. 618, 88 N.E. 2d 519.

Petition of Florida Bar Assoc. (1938) 134 Fla. 851, 186 S. 280, 285.

Clark v. Austin (1937) 340 Mo. 467, 101 S.W. 2d 977.

Richmond Assoc. of Credit Men, Inc. v. Bar Assoc. of City of Richmond (1937) 167 Va. 327, 189 S.E. 153.

Lathrop v. Donohue (1960) 10 Wis. 2d 230, 102 N.W. 2d 404, 367 U.S. 820.

The petition for a writ of certiorari herein should be denied.

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